Supreme Court, U.S.
FILED

(1) No. 961359 FEB 25 1997

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1996

CITY OF NEW YORK, et al.,
Petitioners,

- against -

ROBERT BERY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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February 24, 1997.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly ruled that visual art that lacks a verbal component, or the communication of a clear and distinct message, is entitled to full First Amendment protection, similar to that afforded to books, newspapers, magazines, pamphlets and other similar written material.

2. In light of its holding that visual art is entitled to full First Amendment protection, whether the Court of Appeals correctly ruled that the commercial vending and selling of visual artwork is entitled to the same full First Amendment protection that is afforded to the creation and display of such artwork.

3. Whether the Court of Appeals correctly ruled that the City's requirement that respondents be licensed in order to sell their artwork on the public streets and sidewalks of this City constitutes an unconstitutional infringement of respondents' First Amendment rights, in that the licensing requirement is not narrowly tailored to serve a significant governmental interest, and does not leave open ample alternative channels for the communication of respondents' expression.

4. Whether the Court of Appeals correctly ruled that the challenged ordinance, which prohibits respondents' art from being sold or distributed in public areas without a general vendors license, while written material may be sold and distributed without a license, impermissibly impinges on a fundamental right, thereby violating respondents' rights under the Equal Protection Clause of the Fourteenth Amendment.

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PARTIES TO THIS PROCEEDING

Petitioners are City of New York; Rudolph Giuliani, Mayor, City of New York; William Bratton, Chief, New York City Police Department; Robert Morgenthau, District Attorney-New York; Richard A. Brown, District Attorney-Queens County; William L. Murphy, District Attorney-Richmond County; Charles H. Hynes, District Attorney-Kings County; Robert F. Johnson, District Attorney-Bronx County; Alfred C. Cerullo, III, Commissioner of New York City Department of Consumer Affairs; New York City Department of Consumer Affairs; Henry J. Stern, Commissioner, New York City Department of Parks & Recreation; Marilyn Gerber, Commissioner of the New York City Department of Environmental Protection of the City of New York; Environmental Control Board of the City of New York and Anne J. McCarthy, Executive Director of the Environmental Control Board of the City of New York, in her individual and official capacities.

Respondents are Robert Bery, James Albert Harris, Anne Reiss, Ricardo Antonio Pascual, Artists for Creative Expression on the Sidewalks of New York City, Robert Lederman, Jodi Bogus, Knut Masco, Alexis Portilla and Arthur Robins.

CITATIONS BELOW

The decision and order of the Court of Appeals dated October 10, 1996, reversing the denial of respondents' motions to preliminarily enjoin enforcement of the General Vendors Law, is reported at 97 F.3d 689 (2d Cir. 1996) (A3-23).[1] The amended opinion and order of the District Court dated October 26, 1995 denying the motions is reported at 906 F.Supp. 163 (S.D.N.Y. 1995) (A24-40). The memorandum opinion and order of the District Court dated January 22, 1996, granting summary judgment to petitioners, is reported at 1996 U.S. Dist. Lexis 647 (S.D.N.Y. 1996) (A41-43). The summary order of the Court of Appeals dated November 27, 1996 and issued upon petitioner's petition for rehearing, reversing the District Court's grant of summary judgment to petitioners, is unreported, and is reprinted in the Appendix annexed hereto (A47-50).

JURISDICTION OF THIS COURT

The Court of Appeals' opinion and order was issued on October 10, 1996 (A3-23). Petitioners timely filed a petition for rehearing in the Court of Appeals on October 24, 1996. The Court of Appeals' summary order, on rehearing, was issued on November 27, 1996 (A47-50). This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix filed herewith; numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix filed in the Court of Appeals; numbers in parentheses preceded by the letters "SJA" refer to pages in the Supplemental Joint Appendix filed in the Court of Appeals.

This petition has been filed within the time allowed by law, pursuant to Rule 13.4 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution

Congress shall make no law ... abridging the freedom of speech, or of the press...

General Vendors Law, New York City Administrative Code § 20-452 et seq.

§ 20-452 **Definitions**. For the purposes of this subchapter, the following words and terms shall have the following meaning:

* * *

b. "General vendor." A person who hawks, peddles, sells, leases or offers to sell or lease, at retail, goods or services, including newspapers, periodicals, books, pamphlets or other similar written matter in a public space. This definition shall not include a food vendor as defined in subdivision c of section 17-306 of chapter three of title seventeen of this code, or a person required to be licensed under section 20-229 of subchapter seven of chapter two of this title of this code. This definition also shall not include persons who use stands or booths in a public space for the shining of shoes.

c. "General vending business" or "vending business". The business of selling, leasing or offering to sell or lease, at retail, goods or services other than food, engaged in by a general vendor in a public space.

d. "Public space". All publicly owned property between the property lines on a street as such property lines are shown on the City Record including but not limited to a park, plaza, roadway, shoulder, tree space, sidewalk or parking space between such property lines. It shall also include, but not be limited to, publicly owned or leased land, buildings, piers, wharfs, stadiums and terminals.

* * *

h. "Vend". To hawk, peddle, sell, lease, offer to sell or lease, at retail, goods or services other than food in a public space.

§ 20-453 **License required.** It shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter, except that it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefor.

§ 20-454 **License term; fees.** a. All licenses issued pursuant to this subchapter shall be valid for one year unless sooner suspended or revoked. The commissioner shall establish by regulation the expiration date of such licenses.

b. The commissioner may issue a temporary license upon the furnishing of information and an application in such form and detail as he or she may prescribe and upon the payment of a fee of ten dollars for such temporary license.

c. The annual license fee for a license or a renewal thereof shall be two hundred dollars.

d. The fee for issuing a duplicate license when the original has been lost, destroyed or mutilated shall be ten dollars.

§ 20-459 **New licenses; existing licenses.**

a. The number of licenses in effect pursuant to this subchapter on the first day of September, nineteen hundred seventy-nine shall be the maximum number of licenses permitted to be in effect.

b. A license issued pursuant to this subchapter shall be renewable by the licensee upon its expiration or within sixty days of its expiration provided the licensee meets all other requirements for renewal, provided that the license has not been revoked, and provided that the licensee has not committed violations which could be a basis for license revocation under any provision of this subchapter.

§ 20-466 **Prohibitions.** It shall be unlawful for any person to sell, give or otherwise transfer any goods or merchandise to an unlicensed general vendor for resale in a public space or to rent or otherwise transfer any vehicle, stand or pushcart for use by an unlicensed general vendor in a vending business in a public space.

§ 20-472 **Penalties.** a. Any person who violates the provisions of sections 20-453 and 20-474.1 of this subchapter shall be guilty of a misdemeanor punishable by a fine of not less than two hundred fifty dollars nor more than one thousand dollars, or by imprisonment for not more than three months or by both such fine and imprisonment. In addition, any police officer may seize any vehicle used to transport goods to a general vendor, along with the goods contained therein, where the driver is required to but cannot produce evidence of a distributor's license. Any vehicle and goods so seized may be subject to forfeiture upon notice and judicial determination. If a forfeiture proceeding is not commenced, the owner or other person lawfully entitled to possession of such vehicle and goods may be charged with the reasonable cost for removal and storage payable prior to the release of such vehicle and goods, unless the charge of unlicensed distributing has been dismissed.

* * *

c. 1. In addition to the penalties prescribed by subdivision a of this section, any person who violates, or any person aiding another to violate, the provisions of section 20-453 of this subchapter shall be liable for a civil penalty of not less than two hundred fifty dollars nor more than one thousand dollars together with a penalty of two hundred fifty dollars per day for every day during which the unlicensed business operated.

* * *

§ 20-473 **Exemptions for general vendors who exclusively vend written matter.** General vendors who exclusively vend written matter are exempt from the following provisions of this subchapter: sections 20-454; 20-455, 20-456, 20-457, 20-459, 20-461, 20-462, 20-463 and 20-464; subdivision g of section 20-465; subdivision j of section 20-465, except that nothing herein shall be construed to deprive the commissioner of the department of parks and recreation of the authority to regulate the vending of written matter in a manner consistent with the purpose of the parks and the declared legislative intent of this chapter; section 20-465.1 and any rules promulgated thereunder, except that on any street where both general vending is prohibited pursuant to section 20-465.1 of this subchapter and any rules promulgated thereunder and food vending is prohibited pursuant to section 20-465.1 of this subchapter and any rules promulgated thereunder or pursuant to subdivision 1 of section 17-315 of this code, general vendors who exclusively vend written matter shall not be permitted to vend with the use of any vehicle, pushcart or stand; sections 20-466 and 20-467; subdivisions c and d of section 20-468; sections 20-469 and 20-470; and subdivision a, and paragraph one of subdivision c of section 20-472.

STATEMENT OF THE CASE

The General Vendors Law

The sale of non-food goods and services in public streets and parks, and other public spaces in the City is regulated pursuant to a subchapter of Title 20 of the New York City Administrative Code, known as and referred to herein as the General Vendors Law (JA144, JA165-77,

JA182). Pursuant to the General Vendors Law, Admin. Code §§ 20-452 et seq., it is unlawful for any person to sell or offer for sale in a public space in the City any goods or services, other than exclusively written matter, without first obtaining a general vendor's license ("the licensing requirement") (JA144, JA182-83). Under the City's regulatory scheme, a person who "hawks, peddles, sells, leases, or offers for sale, at retail, [non-food] goods and services ... in a public space" is known as a "general vendor" [Admin. Code § 20-452(b)] (JA146, JA165, JA185-86).

The Licensing Requirement

General vending of all goods and services, except for exclusively written matter, requires a license[2] (JA147, JA186). Administrative Code § 20-453 provides that except as to the vending of only "newspapers, periodicals, books, pamphlets or other similar written matter," it is unlawful to act as a general vendor without first obtaining a general vendor's license from the City's Department of Consumer Affairs ("DCA"). Administrative Code § 20-453 thus requires that general vendors -- that is, vendors of non-food goods and services in the public streets and other public spaces in the City -- must obtain a license to sell or offer for sale any merchandise other than "newspapers, periodicals, books, pamphlets or other similar written

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[2] Individuals who vend merchandise at street fairs sponsored by non-profit associations are exempt by regulation from the licensing requirement. Rules of the City of New York ("RCNY"), Title 6, § 2-305 (JA147).

matter"[3] (JA157, JA196). Each person applying for a general vendor's license must file a written application with the Department of Consumer Affairs ("DCA") setting forth certain information and establishing compliance with certain requirements [Admin. Code § 20-455(b)] (JA147-48, JA167, JA187).

The total number of available general vendors licenses in effect at any given time is limited (JA149, JA188). Pursuant to Admin. Code § 20-459(a), the "maximum number of [general vendor's] licenses permitted to be in effect" is 853, which is the "number of licenses in effect ... on [September 1, 1979]"[4] (JA149, JA168, JA188). There are presently 853 general vendors licenses in effect, not including those general vendors who have obtained

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[3] The General Vendors Law was amended by Local Law No. 33 of 1982 so as to exempt from the licensing requirement vendors of newspapers, books, and other written matter. In this regard, the City Council found and declared that "it is consistent with the principles of free speech and freedom of the press to eliminate [certain] restrictions on the vending of written matter," including the licensing requirement [L.L. 33/1982, § 1] (JA147).

[4] Administrative Code § 20-459(a) was amended by Local Law No. 50 of 1979 so as to limit the total number of general vendor's licenses in effect, the City Council having found that "a limit on the total number of general vendor licenses should be established, because the business of general vending is intimately connected with problems of congestion on streets and sidewalks, and because an increase in the number of general vendors would worsen those conditions" [L.L. 50/1979, § 1] (JA149, JA188).

licenses as veterans[5] (JA149, JA188). DCA maintains a waiting list of individuals seeking to obtain general vendors licenses (JA149, JA188).

Any person who violates the licensing requirement is guilty of a misdemeanor punishable by fine and/or imprisonment, and is liable for civil penalties [Admin. Code § 20-472(a), (c)(1)] (JA149, JA174-75, JA189). In addition, any police officer is authorized to seize the goods being sold and any vehicles, pushcarts, stands or other devices used by a general vendor in violation of the licensing requirement (JA149-50, JA189). The goods and other items seized in this regard are subject to forfeiture upon notice and judicial determination [Admin. Code §§ 20-468(c), 20-472(a)] (JA150, JA173, JA174, JA189).

Enforcement

In enforcing the licensing requirement, the Police Department interprets the phrase "other similar written matter" (Admin. Code § 20-453) to mean any printed material which, taken in its entirety, seeks to express ideas or thoughts through the written word -- that is, the overall function of the material is to communicate information, concepts, or ideas through written language (JA157, JA196). Consequently, baseball cards and other trading

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[5] The restriction on the number of general vending licenses is not applicable to veterans, as New York State law requires that any veteran who qualifies for a vending license be issued one. See New York General Business Law, § 32. As of October 21, 1994, DCA had issued to veterans 340 licenses over and above the limit of 853 provided by local law. That is, as of October 1994, there were a total of 1,193 general vendors licenses in effect (JA149, JA188).

cards are considered to be "other similar written matter," the peddling of which is exempt from licensing, as each card contains printed language which communicates information regarding the subject featured on the card (JA157, JA196).

Conversely, calendars are not considered to be "other similar written matter" because they are essentially measuring devices, the overall purpose of which is not to inform or communicate, but to measure the passage of time (JA157, JA196). Likewise, a watch or a ruler is not considered to be written matter, because again, despite the presence of written numerals or labels, its overall function is to measure time or distance, rather than to inform or communicate (JA157, JA196). Similarly, street maps, even when presented in a bound collection, are not considered to be either books or other written matter, because street maps are essentially pictorial representations which are used as tools to locate places (JA157-58, JA197). Although a map contains writing, it does not express ideas or information through written language (JA158, JA197).

The Police Department enforces the licensing requirement against general vendors of record albums, cassette tapes, and compact discs containing pre-recorded music, and against vendors of videotapes containing prerecorded films, even where the merchandise contains written labels identifying the pre-recorded music or films being offered for sale (JA158, JA197). Taken as a whole, these items do not express thoughts or ideas through written language, as any written labels are incidental in nature (JA158, JA197).

Similarly, the street vending of paintings, photographs, and prints is considered to be subject to the licensing requirement, whether or not these items are signed or labeled, as again, any such written language is considered to be incidental in nature (JA158, JA197). Likewise, the peddling of sculptural representations, leathercraft, pottery, glasswork, jewelry, clothing, and all other similar merchandise is considered to be subject to the licensing requirement, even where the product contains a signature -- as in a signed piece of pottery -- or some written language -- as in t-shirts or mugs (JA158, JA197).

The Police Department's enforcement policies are applied equally to all general vendors who are subject to the licensing requirement, whether they are vending paintings, jewelry, T-shirts, pre-recorded music, or some other type of merchandise (JA159, JA198).

The police officers on the scene make an arrest or issue a summons for unlicensed vending only after observing the individual in question for a sufficient period of time to establish that he or she has possession or control of goods which are being sold or offered for sale, and that he or she is not publicly displaying a general vendors license (JA160, JA198-99). To ascertain that an individual is in possession or control of the goods in question, a police officer must observe the individual essentially doing one of three things: (1) standing for a period of time immediately in front of, behind, or next to a cart, box, table, blanket, or other display, in or upon which merchandise is spread out for sale, where that individual is the only person who is uninterruptedly in immediate proximity to the merchandise during the period of observation; (2) holding an open briefcase or other container containing merchandise and

showing it to numerous passersby; or (3) holding merchandise in his hand and showing it to numerous passersby (JA160, JA199).

To ascertain that the individual is actually selling or offering for sale the merchandise in his or her control, the police officer must either hear the individual hawking merchandise to passersby, or see the individual exchange the merchandise for currency (JA160, JA199). In circumstances where it is not entirely clear that the individual has been offering the displayed merchandise for sale, a plain clothes police officer will approach the individual and ask the price of the merchandise, as well as other questions designed to determine whether the individual is in fact offering the merchandise for sale (JA160, JA199).

Procedural Background

The various respondents in these actions allege that they are "visual artists who challenge the constitutionality" of the General Vendors Law (JA16), and "artists who sell fine art of their own creation on the sidewalks of New York," seeking to enforce their rights pursuant to the Federal and State Constitutions, and the Federal civil rights laws (JA99). Respondents filed complaints seeking injunctive and declaratory relief against the enforcement of New York City Administrative Code §§ 20-453 et seq., under the First and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8 and 11 of the New York State Constitution (JA15-34, JA96-116), and thereafter moved for a temporary restraining order and preliminary injunction (JA90-95, JA117-43), seeking to enjoin "the continuing enforcement and prosecution of General Vendors

Law § 20-453 et seq. of the Administrative Law of the City of New York" (JA94). Petitioners answered the complaints, opposed respondents' motions for a preliminary injunction, and cross-moved for summary judgment against the Bery respondents (JA48-57, JA81-89, JA144-63, JA180-202).

In support of their motion for summary judgment, respondents alleged that there was no genuine material issue of fact for trial. Petitioners noted the licensing requirement for general vendors set forth in Administrative Code § 20-453; that the total number of available general vendors' licenses in effect at any given time is 853 (not including licenses issued to veterans pursuant to New York General Business Law § 32); DCA maintains a waiting list of individuals seeking to obtain general vendors licenses; an individual who violates the licensing requirement is guilty of a misdemeanor; the licensing requirement applies to individuals seeking to sell or offer for sale paintings, sculpture, and/or photographs in a public space; respondents do not have general vendors licenses; and that even if respondents were otherwise qualified to obtain general vendors licenses, they could not presently obtain such licenses due to the statutory limitation on the number of general vendors licenses in effect (SJA5-7).

DECISIONS BELOW

By amended opinion and order dated October 26, 1995, the District Court denied respondents' motions for a preliminary injunction (A24-40). The Court observed that the First Amendment expressly refers to "speech" and the press," and that the exact nature of First Amendment protection for painting and sculpture with no verbal

elements has not been addressed by the federal courts (A32). The Court opined that "[w]hile in certain circumstances works of art may be 'protected' by the First Amendment, it does not follow that the City violates the First Amendment whenever it regulates activity in public areas and incidentally frustrates the desires of some artists to sell their work in such places" (A33).

Applying the standard enunciated in United States v. O'Brien, 391 U.S. 367, 376-77 (1968) for assessing content-neutral government regulations, the District Court ruled that there was no question that regulation of activities in public areas was within the City's constitutional powers, and recognized the City's important and substantial interest in keeping the public streets free of congestion for the safety and convenience of its citizens (A34). The Court concluded that the regulation in issue furthers that interest, and is unrelated to the suppression of free expression; and that the City's goal of keeping the public sidewalks free of congestion would be achieved less effectively in the absence of the regulation (A35).

The Court ruled that although some art may be very close to "pure speech," respondents' art in these cases do not convey either words or the particularized social and political messages upon which the First Amendment places special value (A38). The Court concluded that respondents have not demonstrated that the content-neutral regulation in issue, as it incidentally affects artists' sales of apolitical paintings on the sidewalks, unconstitutionally interferes with their rights to freedom of speech (A38). The Court further concluded that the City's vending law does not violate respondents' equal protection rights under the Fourteenth Amendment. Using a "rational basis" test, the Court found

that the City's decision to exempt sellers of written matter from the licensing requirement was not irrational (A38-39).

The Court thereupon denied respondents' motions for a preliminary injunction, ruling that without a likelihood of success on the merits of their constitutional challenge, plaintiffs do not demonstrate irreparable harm (A40).

By memorandum opinion and order dated January 22, 1996, the District Court, finding no genuine issue of material fact for trial under Fed. R. Civ. P. 56(e), granted petitioners' motion for summary judgment against the Bery respondents, for the reasons stated in its order denying respondents' motion for a preliminary injunction (A41-43). The District Court entered a judgment on February 20, 1996, denying respondents' motions for a preliminary injunction, and granting petitioners' motion for summary judgment against the Bery respondents, dismissing the complaint (A44-46).

By opinion entered October 10, 1996, the Court of Appeals reversed the District Court's judgment (A3-23). The Court noted that the First Amendment shields more than political speech and verbal expression, and that the First Amendment's "fundamental purpose" is to protect all forms of peaceful expression in all its various manifestations (A11-13). The Court found that not only the display of visual artwork, but also the sale of such art, is protected expressive activity under the First Amendment, and that the street vending is in fact a part of the artists' message (A15-16). The Court ruled that while objects crafted by jewelers, potters and silversmiths may at time have expressive content, paintings, photographs, prints and sculptures, such as those respondents seek to display and

sell in public areas of the City, "always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection" (A16). The Court ruled that the difficulty in determining what constitutes expression within the purview of the First Amendment does not warrant placing all visual expression outside the protective reach of the First Amendment (A16).

Applying intermediate scrutiny applicable to content-neutral regulations that restrict the time, place and manner of protected speech (see Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)), the Court, while recognizing the City's significant interest in keeping its public spaces safe and free of congestion, concluded that the license requirement, as it effectively bars respondents from displaying or selling their art on the streets, was "too sweeping to pass constitutional muster" (A18). Given the limited, low number of total outstanding licenses, the Court found that the ordinance was "a de facto bar preventing visual artists from exhibiting and selling their art in public areas in New York" (A18-19). The Court held that the City's requirement that respondents be licensed in order to sell their artwork in public spaces constitutes an unconstitutional infringement of their First Amendment rights, ruling that the ordinance was not narrowly tailored to further the City's significant objectives of keeping the sidewalks and streets free of congestion and safe for public passage, and that the ordinance did not leave open alternative channels of communication for respondents' protected expression, as the City's sidewalks must be available for respondents to reach their public audience (18-22). Finally, by a vote of 2-1, the Court concluded that the ordinance violated respondents' rights to equal protection of the laws, as it impermissibly impinged on a fundamental

right in prohibiting respondents' art from being sold in public areas without a general vendors license, while allowing written material to be sold without a license (A22-23). The Court of Appeals accordingly reversed the District Court's judgment denying the preliminary injunction.

On petitioners' petition for rehearing, the Court of Appeals applied the same reasoning to reverse the District Court's order granting petitioners' motion for summary judgment (A47-50).

REASONS TO GRANT WRIT

The Court of Appeals in this case stretched the outer limits of the First Amendment to apply to and protect the sale of all artwork on public streets (whether or not the art conveys a particular message or idea), in the same manner that the sale of written material (which, by its nature, is always deemed to communicate particularized messages, thoughts or ideas) is so protected. The Court ruled that petitioners' licensing requirement for general vendors, as applied to artists who seek to sell their artwork on this City's public streets and sidewalks, unconstitutionally infringes respondents' First Amendment rights to freedom of expression, and Fourteenth Amendment rights to equal protection of the laws. Accordingly, the decision effectively usurps the City's regulatory power to control the time, place and manner of street vending with respect to artists, and prevents the City from reasonably regulating the public sale of artwork, as it does for other types of merchandise, in light of what the Court acknowledged was the City's significant interests in keeping its public streets and sidewalks safe and free of congestion and obstacles.

The Second Circuit Court of Appeals' decision in this case directly conflicts with a recent decision of the Ninth Circuit Court of Appeals in One World One Family Now v. City and County of Honolulu, 76 F.3d 1009 (9th Cir.), cert denied, __ U.S. __, 117 S.Ct. 554 (1996). The Ninth Circuit Court of Appeals in that case upheld an outright ban on the sale of message-bearing T-shirts by nonprofit organizations throughout Waikiki, a tourist, residential and commercial district of Honolulu, Hawaii.[6]

The Court in One World found that the plaintiffs' activities, which closely resembled those of the plaintiffs in Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059 (9th Cir. 1991), cert. denied, 504 U.S. 914 (1992), were protected under the First Amendment, noting that "when the sale of merchandise bearing political, religious, philosophical, or ideological messages is 'inextricably intertwined' with other forms of protected expression (like distributing literature and proselytizing), the First Amendment applies." One World, 76 F.3d at 1012, quoting Gaudiya, 952 F.2d at 1064. Having determined that the plaintiffs' message-bearing T-shirt sales fell within the ambit of the First Amendment, the Court in One World then concluded that Honolulu's peddling ordinance is valid as applied to them, in that the ordinance is content-neutral (as it imposes a flat ban without regard to content); is narrowly tailored to serve substantial

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[6] Waikiki is a self-contained district within the City of Honolulu, comprising about 500 acres. It has the highest concentration of tourists in the City, as well as a large residential population. 76 F.3d at 1011. Waikiki is considered to be the social and economic center of not just Honolulu, but also the entire State of Hawaii. Id. at 1022 (Pergerson, J., dissenting).

legitimate governmental interests throughout Waikiki (i.e., maintaining the aesthetic attractiveness of Waikiki, promoting public safety and orderly movement of pedestrians on Waikiki's crowded sidewalks, and protecting the local merchants from unfair competition), all of which would be achieved less effectively absent the regulation; and leaves open ample alternative channels of communication (as the ordinance forecloses only one narrow form of expression -- sidewalk sales of message-bearing merchandise -- while leaving the plaintiffs with a number of alternative means of disseminating their message to people on the sidewalks). Id. at 1012-15. Distinguishing this Court's decision in City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038 (1994), the Court opined that "[w]hile wearing a message-bearing T-shirt might be a uniquely valuable mode of communication whose total ban could raise serious constitutional questions, ... the same can't be said for selling such a T-shirt on the sidewalk." One World, 76 F.3d at 1015 (emphasis in original; citation omitted).

The Second Circuit Court of Appeals' ruling in the case at bar directly conflicts with the Ninth Circuit's recent opinion in One World. The Second Circuit here rejected petitioners' argument, and the District Court's ruling, that the First Amendment does not protect nonverbal artistic expression that does not convey a particularized message, and, interpreting the First Amendment far more broadly than in One World, 76 F.3d at 1012, opined instead that visual artwork is as much the artists' expression as is a written text, and that such art, even without a particularized message, always communicates some idea or concept to those who view it (A16). Moreover, although recognizing that the City has a significant interest in keeping its public

spaces safe and free of congestion (as in One World, 76 F.3d at 1012), the Second Circuit here struck down the licensing requirement on Constitutional grounds, finding it to be a de facto bar preventing visual artists from selling their art in public areas in New York (much like the ordinance that was upheld in One World constitutes an outright ban on the sale of message-bearing T-shirts by nonprofits throughout Waikiki, which has the effect of depriving the plaintiffs of access to Waikiki's large and diverse audience, see 76 F.3d at 1022-23 (Pergerson, J., dissenting)). The Second Circuit here, however, unlike the Ninth Circuit in One World, invalidated the licensing requirement as "too sweeping to pass constitutional muster," with the result that the two cases have reached inconsistent and diametrically opposed conclusions.

Unlike the message-bearing T-shirts imprinted with various philosophical and inspirational messages, that were at issue in One World, 76 F.3d at 1011, the artwork in the case at bar has not been alleged by the respondents as conveying any particularized or distinct political or social or religious message or idea, so as to entitle it to full First Amendment protection. This Court has stated that non-verbal conduct is protected by the First Amendment only where it is "sufficiently imbued with elements of communication" as to express a clear and distinct message. Spence v. Washington, 418 U.S. 405, 409-10 (1974). "The Government generally has a freer hand in restricting expressive conduct that it has in restricting the written or spoken word." Texas v. Johnson, 491 U.S. 397, 406 (1989). For example, the First and Fourteenth Amendments do not afford the same degree of freedom to those who seek to communicate ideas by conduct such as patrolling, marching and picketing on streets and highways,

as these amendments afford to those who communicate ideas by pure speech. Cox v. Louisiana, 379 U.S. 536, 555-56 (1965).

Where, as here, there is no suggestion that the art seeks to express political or social messages or thought, an exhibition of paintings is not as communicative as speech, literature, or live entertainment, and the artist's "constitutional interest" is thus "minimal." See Close v. Lederle, 424 F.2d 988, 990 (1st Cir.), cert. denied, 400 U.S. 903 (1970). Cases involving pure speech, such as the right to hear unpopular speakers, "involve a medium and subject matter entitled to greater protection" than artwork. Id. Indeed, other than the decision at bar, Piarowski v. Illinois Community College, 759 F.2d 625, 628 (7th Cir.), cert. denied, 474 U.S. 1007 (1985), is apparently the only published case that can be read to suggest that the display of visual artwork is, in and of itself, fully protected under the First Amendment, although in that case the artwork in question was sufficiently expressive to communicate, at least to some viewers, a racist and/or sexist message. Cf. Serra v. United States General Services Administration, 847 F.2d 1045, 1048 (2d Cir. 1988) ("artwork, like other non-verbal forms of expression, may under some circumstances constitute speech for First Amendment purposes" (emphasis added); Court did not reach issue of whether and to what extent the display of the plaintiff's sculpture, which had been sold to the government, constituted protected expression).

The relevant inquiry is not whether non-verbal conduct involves the display of something that can be characterized as art, but rather, whether that display is sufficiently communicative to warrant First Amendment

protection. Contrary to the Second Circuit's ruling here, respondents' artwork, absent a distinct message or communicative aspect, should not necessarily be deemed to be subject to First Amendment protection under all circumstances.

Moreover, even if the display of artwork is considered to be expressive conduct entitled to some degree of First Amendment protection, the vending of such artwork on the public streets is not conduct that is protected by the First Amendment. In addition, while the vending of newspapers and similar printed matter on the streets is protected by the First Amendment under both freedom of speech and freedom of press guarantees, the street vending of visual artwork is not so protected. While there may be circumstances under which the public display of visual artwork may be protected by the First Amendment -- and indeed, the licensing requirement at issue here is not addressed to the public display of artwork -- the street peddling of visual artwork is not so inseparably intertwined with any protected expression as to warrant First Amendment protection in its own right.

As a practical matter, it would be nearly impossible to exempt from licensing street vendors of merchandise that can somehow be characterized as artwork, while requiring that vendors of goods that cannot be so characterized obtain a license. As almost any shape, design, or pictorial representation can qualify as art, an exemption for artwork would be nearly impossible to legislate. "The question of what is art is inherently subjective," and the "courts are ill equipped to determine such illusory and imponderable questions..." Yurkew v. Sinclair, 495 F.Supp. 1248, 1254 (D. Minn. 1980). Thus, the degree of First Amendment

protection afforded to the street vending of merchandise should not depend on whether the merchandise "can be some stretch of the imagination be characterized as art or art form." Id.

In Duchein v. Lindsay, 42 A.D.2d 100 (1st Dept. 1973), aff'd, 34 N.Y.2d 636, appeal dismissed, 419 U.S. 809 (1974), the New York Court of Appeals affirmed a determination that the street vending of artwork was not subject to First Amendment protection. Responding to a claim by an artist vendor that the City's regulations regarding the location of vending displays "restrict[ed] plaintiff's freedom of expression as an artist," the Court held that the vending restrictions did not in any way restrict First Amendment activity, as the restrictions had "only to do with the commercial aspects of plaintiff's activities as he peddles the tangible manifestations of his otherwise untrammeled freedom of expression." Id., 42 A.D.2d at 101. This Court dismissed Duchein's appeal, wherein he had asserted, inter alia, a violation of his First and Fourteenth Amendment rights.

While this Court recently stated in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, ___U.S.___, 115 S.Ct. 2338, 2345 (1995) that Jackson Pollock's creation of a painting is "unquestionably shielded" by the First Amendment even though it lacks a "succinctly articulable message," it is questionable that this Court intended that the creation and display of any product that is labeled "art" be afforded First Amendment protection. Even assuming, however, that the creation of all artwork is entitled to some First Amendment protection, the peddling of that artwork in the public streets is not so inextricably intertwined with the protected activity as to be entitled to

First Amendment protection as well. The licensing requirement challenged here does not restrict the creation of art; it simply restricts the peddling of artwork in the public streets.

"It is possible to find some kernel of expression in almost every activity a person undertakes ... but such a kernal is not sufficient to bring the activity within the protection of the First Amendment." City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989). The street vending of artwork is conduct which is not sufficiently expressive or communicative to warrant First Amendment protection.

Even assuming that respondents' art in the case at bar is deemed to be subject to full First Amendment protection, the licensing requirement is valid as a reasonable time, place and manner restriction as applied to respondents, in that, just as in One World, the licensing requirement is content-neutral, as it imposes a flat ban on unlicensed vending of all merchandise and artwork (except written matter) regardless of the content or any message being conveyed; the law is narrowly tailored to serve a significant and substantial government interest, since absent the licensing requirement and the limit of 853 licenses, the City's interest in controlling congestion on the streets and sidewalks would certainly be achieved far less effectively, if it could thereby be achieved at all; and the law leaves open ample alternative channels of communication, since respondents remain free to sell their artwork in private establishments, from their own homes, or on their own property, and remain free to display their artwork on the street and to advertise its availability for sale elsewhere. As in One World, the ordinance forecloses only one narrow form of expression -- street and sidewalk sales of art --

while leaving respondents with a number of alternative means of conveying their "message" by displaying their artwork, or even selling it elsewhere.

Nor does the General Vendors Law violate plaintiffs' equal protection rights, since the exemption from the licensing requirement for sellers of exclusively written material has a rational basis, and is not premised or dependent upon the particular message being conveyed, or upon any impermissible classification which impinges upon a fundamental right or employs a suspect classification, such as race, religion or gender.

In City of New Orleans v. Dukes, 427 U.S. 297 (1976), this Court upheld a City ordinance which prohibited food vending from pushcarts in a certain area of New Orleans, and exempted vendors who had done so for a certain number of years. Noting that "[s]tates are accorded wide latitude in the regulation of their local economies under their police powers," id. at 303, this Court held that the City's classification rationally furthered the City's obviously legitimate objective in preserving the appearance and character of the area, which objective was furthered by the reasoned judgment that "street peddlers and hawkers tend to interfere with the charm and beauty of a historic area and disturb tourists and disrupt their enjoyment of that charm and beauty, and that such vendors ... might thus have a deleterious effect on the economy of the city." Id. at 304-05. This Court expressly found that such business could be legitimately substantially curtailed, or entirely banned in order "to ensure the economic vitality of that area." Id. at 305.

The City's objectives in the case at bar in regulating street vendors, including alleviating street congestion, and promoting public safety and welfare throughout New York City, where millions of people reside, and millions more regularly visit for both business and pleasure, are equally legitimate and laudable, and are certainly reasonably furthered by the licensing requirement and other vending restrictions, including the cap on the number of licenses that are issued to general vendors. Respondents failed to demonstrate any equal protection violation because vendors of printed or written matter are not subject to the same licensing restrictions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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City of New York
Attorney for Petitioners.

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February 24, 1997

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1620, 1621, 1782—August Term 1995

(Argued: April 26, 1996 Decided: October 10, 1996)

Docket Nos. 95-9089(L), 95-9131, 96-7137

ROBERT BERY, JAMES ALBERT HARRIS, ANNE REISS, RICARDO ANTONIO PASCUAL, ARTISTS FOR CREATIVE EXPRESSION ON THE SIDEWALKS OF NEW YORK CITY, ROBERT LEDERMAN, JODI BOGUS, KNUT MASCO, ALEXIS PORTILLA and ARTHUR ROBINS,

Plaintiffs-Appellants,

—vs.—

CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor, City of New York; WILLIAM BRATTON, Chief, New York City Police Department; ROBERT MORGENTHAU, District Attorney-New York County; RICHARD A. BROWN, District Attorney-Queens County; WILLIAM L. MURPHY, District Attorney-Richmond County; CHARLES H. HYNES, District Attorney-Kings County; ROBERT F. JOHNSON, District Attorney-Bronx County; ALFRED C. CERULLO, III, Commissioner of New York City Department of Consumer Affairs; NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS; HENRY J. STERN, Commissioner,

New York City Department of Parks & Recreation; MARILYN GELBER, Commissioner of the New York City Department of Environmental Protection of the City of New York; ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and ANNE J. MCCARTHY, Executive Director of the Environmental Control Board of the City of New York, in her individual and official capacities,

Defendants-Appellees.

Before:

VAN GRAAFEILAND and MAHONEY, *Circuit Judges*, and CARTER, *District Judge*.[1]

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, *Judge*, denying motions to enjoin enforcement of the General Vendors Law, § 20-452 *et seq.* of the Administrative Code of the City of New York, on the grounds that the complained enforcement was prohibited by neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Reversed.

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[1] Honorable Robert L. Carter of the United States District Court for the Southern District of New York, sitting by designation.

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NOAH A. KINIGSTEIN, New York, NY *for Bery Plaintiffs-Appellants.*

RANDALL M. FOX, New York, NY (Dewey Ballantine, New York, NY) *for Lederman Plaintiffs-Appellants.*

ELIZABETH I. FREEMAN, New York, NY (Paul A. Crotty, New York, NY Corporation Counsel of the City of New York, Leonard Koerner, Robin Binder, Assistant Corporation Counsels) *for Defendants-Appellees City of New York.*

CARTER, *District Judge*:

Appellants *Robert Bery et al.* (94 Civ. 4253) and *Robert Lederman et al.* (94 Civ. 7216), in separate actions below, sought by motions for a preliminary injunction to enjoin enforcement of the General Vendors Law, § 20-452 *et seq.* of the Administrative Code of the City of New York ("General Vendors Law"), which bars visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license. Appellees City of New York and various municipal bodies and officials charged with administration and enforcement of the General Vendors Law ("the City") opposed the motions. The district court denied the motions; both sets of appellants appeal.

Background

Appellants are individual artists engaged in painting, photography and sculpture and an artists' advocacy organization, Artists for Creative Expression on the Sidewalks of New York. The individual artists have been arrested, threatened with arrest or harassed by law enforcement officials for attempting to display and sell their creations in public spaces in the City without a general vendors license. Some have had their art work confiscated and damaged. At least one asserts a desire to sell and display her art on the sidewalks of New York but has not done so for fear of arrest and destruction of her work.

The Bery appellants commenced their action on June 9, 1994, with the filing of a summons and complaint. The Lederman complaint was filed on October 5, 1994. Both sets of plaintiffs subsequently moved for a temporary restraining order and preliminary injunction. On October 24, 1995, the district court issued its memorandum and order jointly denying the motions for preliminary injunction in both actions, and on October 26, 1995, filed an amended opinion reported at 906 F. Supp. 163. By order of this court dated December 13, 1995, the actions were consolidated on appeal.

The General Vendors Law contains regulatory provisions concerning the sale or offering for sale of non-food goods and services in public spaces in the City of New York. Pursuant to § 20-452(b) of the Administrative Code of the City of New York ("Administrative Code"), a person who "hawks, peddles, sells, leases or offers to sell or lease, at retail, [non-food] goods or services. . . in a public space" is a general vendor. Public space is defined as "[a]ll publicly owned property between the

property lines on a street as such property lines are shown on the City Record including . . . a park, plaza, roadway, shoulder, tree space, sidewalk or parking space between such property lines. . . . [as well as] publicly owned or leased land, buildings, piers, wharfs, stadiums and terminals." Administrative Code § 20-452(d).

At issue in the present case is § 20-453 of the General Vendors Law, a provision which initially required a license for all general vendors who sought to sell non-food goods or services in public spaces in the City. In 1982, Local Law 33 was enacted amending § 20-453 to exempt from the licensing requirement vendors of newspapers, books and other written matter. L.L. 33/1982. In enacting the amendment, the City Council described the new provision as consonant with the "principles of free speech and freedom of the press." *Id.* at § 1. In 1979, § 20-459(a) of the Administrative Code was amended by Local Law 50 to limit the total number of licenses in effect at any given time to the number of licenses in effect on September 1, 1979. L.L. 50/1979. The number at that time was 853. However, that limitation rests on a slippery slope, since any veteran who qualifies for a vending license must be issued one. New York State General Business Law § 32 (McKinney 1994). As of the present, 340 such licenses over and above the 853 cut-off number have been issued to veterans, making a total of 1,193 general vendors licenses in effect.

Violators of the licensing requirement are guilty of a misdemeanor punishable by fine and/or imprisonment and civil penalties. *See* Administrative Code § 20-472(a) and (c)(1). If criminally convicted, the violator is subject to a fine of not less than $250 nor more than $1000 and/or imprisonment of up to three months. Administrative Code § 20-472(a). If found civilly liable, the vio-

lator may be fined not less than $250 nor more than $1000, together with a fine of $250 for each day of the unlicensed activity. Administrative Code § 20-472(c)(1). In addition, police officers are authorized to seize the items being sold and the seized items are subject to forfeiture. Administrative Code §§ 20-468 and 20-472(a).

Administrative Code §§ 20-465(a), (b), (e), (f), (k), (m), (n), and (q) restrict the placement, location and size of vending displays and prohibit vending where an authorized city employee has given notice that exigent circumstances require the vendor to move. These regulations are applicable to all general vendors, including vendors of exclusively written matter. Vending, except for written matter, in a park is barred without written authorization from the Department of Parks and Recreation, Administrative Code § 20-465(j); it is also banned from certain commercial zoning districts and in a delineated section of midtown Manhattan. Administrative Code § 20-465(g).

District Court's Determination

The district court denied appellants' motions for preliminary injunctions, dealing with both motions in a joint decision issued in amended form on October 26, 1995. *See Bery v. City of New York*, 906 F. Supp. 163 (S.D.N.Y. 1995) (Cedarbaum, J.). The court ruled that the General Vendors Law was a content-neutral municipal ordinance of general application which violated neither the First nor the Fourteenth Amendment, although its incidental effect was to restrict the sale of art on the sidewalks of New York. The limitation of 853 licenses in effect at a given time, a waiting list of between 500 and 5,000 applicants, a waiting time of between 3-5 years to secure

a license[2] and the absence of any of the appellants' names on the waiting list did not cause the court to modify this conclusion.

Stating that "[t]he precise nature of First Amendment protection for painting and sculpture with no verbal elements has not been addressed by the federal courts," the district court likened appellants' "fine art" to "applied or decorative art" and found that it rated only limited constitutional protection, in the absence of evidence of government censorship. The court found neither censorship nor animus towards artists as a motivation behind the enactment of the ordinance by the City Council. It thus deemed the ordinance content-neutral and subjected it to a more lenient level of scrutiny than would have been required had it been content-based. *Id.* at 168.

Applying the standard enunciated in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), the court found the provision furthered a public interest unrelated to the suppression of free speech that would be achieved less effectively absent the regulation. *Id.* The prohibition on the sale of art on the streets without a general vendors license, the court found, was appropriately designed to deal with the problem of street congestion. *Id.* The court did not address the question of whether alternative channels of expression remained open to appellants.

The court reasoned that words expressing "political or religious views are much closer to the heartland of First Amendment protection of 'speech' than the apolitical paintings in these cases." *Id.* at 169. Based on this premise, the court found the City's exemption of the sellers of written matter from the licensing requirement

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[2] It is not clear whether this is the delay anticipated to receive a license or merely to be placed on the waiting list.

a rational determination consonant with the requisites of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 170. Thus, the court denied appellants' motions for a preliminary injunction on both First Amendment and Equal Protection grounds. *Id.*

Standards

This court reviews the district court's denial of appellants' preliminary injunction motions with an abuse of discretion standard. *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). "An abuse of discretion exists when the district court has made an error of law or of fact." *Id.* (citations omitted). In the present case, since appellants seek vindication of rights protected under the First Amendment, we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court. *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S. Ct. 2338, 2344 (1995). Such a "fresh examination of crucial facts" is necessary even in the face of the "clearly erroneous" standard of factual review set forth in Rule 52(a), F.R. Civ. P. *Hurley*, 115 S. Ct. at 2344.

In order to justify the award of a preliminary injunction, the moving party must first demonstrate that it is likely to suffer irreparable harm in the absence of the requested relief. *Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 11 (2d Cir. 1982). Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373

(1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); 11A Charles A. Wright, Arthur R. Miller and Mary Kane, *Federal Practice and Procedure*, § 2948.1 at 161 (2d ed. 1995) ("[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary"). By the very nature of their allegations, then, appellants have met the first prong of the test.

Ordinarily, the movant then has two options: it must either demonstrate a likelihood of success on the merits or it must raise "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sperry Int'l Trade, Inc.*, 670 F.2d at 11, citing *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). However, in a case in which "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard. *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989).

Discussion

I.

Initially, we note that the district court's view of the reach of the First Amendment is more restricted than the jurisprudence warrants. The First Amendment shields more than political speech and verbal expression; its protections extend to entertainment, *Winters v. New York*,

333 U.S. 507, 510 (1948); film, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); theater, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); music, without regard to words, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); peaceful marches to express grievances to governmental authorities, *Gregory v. Chicago*, 394 U.S. 111, 112 (1969), *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969); sit-ins by blacks to protest racial discrimination, *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966); the wearing of black arm bands to evidence disapproval of our involvement in Vietnam, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969); the refusal to salute the flag as part of a regularized school activity, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943); and most recently, parades with or without banners or written messages, *Hurley*, 115 S. Ct. at 2345. "[T]he Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 115 S. Ct. at 2345. If the First Amendment reached only "expressions conveying a 'particularized message,' ", its "protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 2345 (quoting from *Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam).

The First Amendment has surely been valued as essential to the preservation of a political democracy in this country; thus, even the pamphleteer espousing political sedition has been shielded from governmental suppression. *See, e.g., Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("even advocacy of violation [of the law], however reprehensible morally, is

not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on"). The First Amendment's fundamental purpose, however, is to protect all forms of peaceful expression in all of its myriad manifestations. *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("[i]t is no doubt true that a central purpose of the First Amendment ' "was to protect the free discussion of governmental affairs." ' (citations omitted). But our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection") (footnote omitted). *See also Joseph Burstyn,Inc.*, 343 U.S. at 501 (motion pictures are fully protected expression that "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression").

The district court viewed the First Amendment's primary function as safeguarding the free flow of political and religious views, and hence felt sanguine about the ordinance's interference with appellants' "wish to sell their apolitical paintings." *Bery*, 906 F. Supp. at 170. The City apparently looks upon visual art as mere "merchandise" lacking in communicative concepts or ideas. Both the court and the City demonstrate an unduly restricted view of the First Amendment and of visual art itself. Such myopic vision not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression. Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is

similarly entitled to full First Amendment protection.[3] Indeed, written language is far more constricting because of its many variants—English, Japanese, Arabic, Hebrew, Wolof,[4] Guarani,[5] etc.—among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are "a primitive but effective way of communicating ideas . . . a short cut from mind to mind." *West Virginia State Board of Education*, 319 U.S. at 632. Visual images and symbols, for example, are used in the Third World so that individuals who are unable to read may readily recognize the party or candidate they wish to vote for. One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.

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[3] *Serra v. U.S. General Services Admin.*, 847 F.2d 1045 (2d Cir. 1988) does not compel a different holding. In *Serra*, this court held that "artwork, like other non-verbal forms of expression, may under some circumstances constitute speech for First Amendment purposes." *Id.* at 1048. The court did not actually reach the question of the level of constitutional protection in artwork, however, since it found that "the First Amendment has only limited application in a case like the present one where the artistic expression belongs to the Government rather than a private individual." *Id.*

[4] A language written and spoken in the Senegambia region of West Africa.

[5] A language used by both indigenous and non-indigenous peoples in Paraguay.

Furthermore, written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. As appellants point out, Chinese characters are both narrative and pictorial representations. Nahuatl, a language used by Aztec peoples in Central America, also incorporates pictures in its written language. Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished.

The City argues that appellants' "expression" allegedly impinged by the Regulation is not in fact their art, but their peddling of the art. It argues that the sale of art is conduct, and in order to be constitutionally protected, the sale of protected material must be "inseparably intertwined with a 'particularized message.' " *Young v. New York City Transit Authority*, 903 F.2d 146, 153 (2d Cir.), quoting *Spence*, 418 U.S. at 410-11, *cert. denied*, 498 U.S. 984 (1990). The City further argues that appellants are free to display their artwork publicly without a license, they simply cannot sell it.

These arguments must fail. The sale of protected materials is also protected. *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 & 768 (1988). "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of Blind of North Carolina*, 487 U.S. 781, 801 (1988). In *United States v. Nat'l Treasury Employees Union*, ___ U.S. ___, 115 S. Ct. 1003 (1995), the United States Supreme Court found that a ban on honoraria for government employees "imposes the kind of burden that abridges speech under the First Amendment," in part because "the denial of compensation for

lower-paid, nonpolicymaking employees will inevitably diminish their expressive output" and will "impose[ ] a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 1014-15. As in the present case, without the money, the plaintiffs would not have engaged in the protected expressive activity.

Furthermore, the street marketing is in fact a part of the message of appellants' art. As they note in their submissions to the court, they believe that art should be available to the public. Anyone, not just the wealthy, should be able to view it and to buy it. Artists are part of the "real" world; they struggle to make a living and interact with their environments. The sale of art in public places conveys these messages.

The district court seems to have equated the visual expression involved in these cases with the crafts of the jeweler, the potter and the silversmith who seek to sell their work. *Bery*, 906 F. Supp. at 167. While these objects may at times have expressive content, paintings, photographs, prints and sculptures, such as those appellants seek to display and sell in public areas of the City, always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection. Courts must determine what constitutes expression within the ambit of the First Amendment and what does not. This surely will prove difficult at times, but that difficulty does not warrant placing all visual expression in limbo outside the reach of the First Amendment's protective arm. Courts have struggled with such issues in the past; that is not to say that decisions are impossible. *See, e.g., Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (social dance distinguished from expressive dance); *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253

(D. Minn. 1980) ("[w]herever the amorphous line of demarcation exists between protected and unprotected conduct for First Amendment purposes, . . . tattooing falls on the unprotected side of the line"). Furthermore, simply because the matter does not lend itself to judicial determination does not mean that it is not appropriate for local lawmakers and governmental bodies such as the City to tackle.[6]

II.

Having determined that appellants' artwork is entitled to full First Amendment protection, we turn now to an application of the appropriate constitutional test. In examining the constitutionality of a regulation that impinges on First Amendment activity, courts will apply a strict scrutiny analysis when the regulation discriminates on the basis of content, and a more lenient analysis to content-neutral regulations. *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, ___ U.S. ___, 114 S. Ct. 2445, 2469 (1994).

The district court labelled the ordinance content-neutral, since it raised no concerns over censorship. It is not clear that this ordinance is content-neutral, however; it distinguishes between written and visual expression in a manner that effectively bans one while subjecting the other to a more limited form of regulation. *See, e.g.*,

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[6] The City proves itself ready to undertake the similarly difficult task of separating written from non-written materials. (*See* Aff. in Support of Cross-Motion for Summary J. at 2-3, reprinted in Joint Appendix at 196-97: *e.g.*, baseball cards are written material, calendars and street maps are not.) There already exists in city ordinances a definition of "artist" that might serve as a helpful starting point: the New York Multiple Dwelling Law, Section 276 defines "artist" for the purpose of determining eligibility for living-work quarters earmarked for artists.

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 592-93 (1983) (law that "targets individual publications within the press" must surmount a heavy burden to satisfy First Amendment strictures); *Buckley v. Valeo*, 424 U.S. 1, 18 (1976) (only regulations which do not discriminate among speakers or ideas are content-neutral). The ordinance's effective bar on the sale of artwork in public places raises concerns that an entire medium of expression is being lost. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S. Ct. 1003 (1995). We need not decide that issue, however, since the ordinance must fall even under the less restrictive yardstick the court applied.

A content-neutral regulation may restrict the time, place, and manner of protected speech, provided it is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Ward*, 491 U.S. at 791, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The City certainly has a significant interest in keeping its public spaces safe and free of congestion. The license requirement as it relates to appellants, however, which effectively bars them from displaying or selling their art on the streets, is too sweeping to pass constitutional muster. *See, e.g., Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993). The district court's failure to properly analyze the questions of narrow tailoring and alternative channels was an abuse of discretion that led to an incorrect result.

The ordinance is a *de facto* bar preventing visual artists from exhibiting and selling their art in public

areas in New York. The total number of licenses outstanding at any given time is a low 853. Those fortunate enough to possess one of these permits may automatically renew it annually which, of course, means that latecomers like appellants have little hope of securing a license in the foreseeable future. In addition to this all-but-impenetrable barrier, a 500-to-5000 person waiting list makes appellants' prospects of securing a license apparently nonexistent, a fact conceded at oral argument.[7]

The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, but it cannot bar an entire category of expression to accomplish this accepted objective when more narrowly drawn regulations will suffice. The City points to nothing on this record concerning its need to ensure street safety and lack of congestion that would justify the imposition of the instant prohibitive interdiction barring the display and sale of visual art on the City streets. *See Wright v. Chief of Transit Police*, 558 F.2d 67, 68-69 (2d Cir. 1977) (city must find less restrictive alternative than

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[7] Richard Schrader, former Commissioner of the City's Department of Consumer Affairs, the department which creates policy regarding licensing of general vendors, states that in an average year 15% of the 853 licenses become available due to previous holders' failure to renew, the only manner in which a license becomes available. (Joint Appendix at 221). In 1990 and in 1991, no licenses were available. In 1993, the discovery of a bookkeeping error revealed that 553 rather than 853 licenses were outstanding. The Department distributed 100 licenses to individuals on the waiting list and issued 200 more by lottery. This is the only occasion when licenses have been awarded in this manner. Aside from this, "no new licenses were issued in the past fifteen years," and based on Schrader's "extensive experience and knowledge," he has "never learned of an artist being licensed to sell art work." (Joint Appendix at 221-223).

complete ban on newspaper vending in subways); *Loper v. New York City Police Dep't*, 999 F.2d 699, 704-05 (2d Cir. 1993) (street begging constitutes expressive conduct which cannot be totally barred without unconstitutional interference with First Amendment rights.)

This is not to say that the display of large, cumbersome works that would block public traverse on the streets may not be subjected to discrete regulation as to time, place and location or indeed that both visual and written expression may not be so restricted by regulations addressed to particular areas of the City where public congestion might create physical hazards and public chaos. For example, requiring a license for a parade, *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), or for a vending machine, *City of Lakewood*, 486 U.S. at 760, or restricting the right to distribute newspapers through newsracks on public property not traditionally a place for public communication, *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F.2d 767, 772 (2d Cir. 1984), are all valid exercises of state police power to control time, place and manner of public access to public spaces.

The ordinance as it stands, however, cannot be considered merely a regulation designed for crowd management and control, or to prevent congestion or to keep the streets clear to allow unimpeded passage of the public over the City's thoroughfares. There exist specific sections of the Administrative Code which directly regulate time, place, manner and location of vending that already achieve these ends without such a drastic effect. *See, e.g.*, Administrative Code § 20-465. Furthermore, the City's licensing exceptions for veterans and vendors of written material call into question the City's argument that the regulation is narrowly tailored. The City does

not maintain control over the absolute number of vendors, since the exceptions are unlimited; the number 853 does not in and of itself control congestion. The City's control over congestion is largely maintained through the time, place and manner restrictions on vending that facilitate the flow of traffic, ease crowding and improve safety.[8]

We turn now to a consideration of whether alternative channels of communication exist for appellants' protected expression. Appellants argue that no such alternatives exist. They contend that licenses are virtually impossible to obtain, and no other forum exists for the display of art by appellants, since museum and gallery space in New York City is drastically limited.

The City states that alternatives exist; appellants may sell their artwork from their homes or seek permission to display it in restaurants and street fairs and the like. However, appellants are entitled to a *public* forum for their expressive activities. *Southeastern Promotions Ltd.*, 420 U.S. at 556 (1975); *Gold Coast Pub., Inc. v. Corrigan*, 798 F. Supp. 1558, 1572 (S.D. Fla. 1992), *aff'd in part, rev'd in part on other grounds*, 42 F.3d 1336 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 337 (1995). Displaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go

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[8] Even if the City were to adhere to a licensing system to regulate street art sales, there exist less intrusive means of issuing the licenses: one *amicus* suggests a rotating first-come, first-served lottery system for assigning a limited number of licenses. (Brf. *amici curiae* of the American Civil Liberties Union *et al.* at 26-27). The system employed by San Francisco might provide a model: certain areas are set aside for art sales and a weekly lottery assigns spots. (Joint Appendix at 313-14, 351). The district court made no mention of these potential alternatives.

into a gallery or museum or who might feel excluded or alienated from these forums. The public display and sale of artwork is a form of communication between the artist and the public not possible in the enclosed, separated spaces of galleries and museums.

Furthermore, to tell appellants that they are free to sell their work in galleries is no remedy for them. They might not be at a point in their careers in which they are interested in reaching the public that attends exhibits at art galleries—if, indeed, they could get their works accepted for showing. Appellants are interested in attracting and communicating with the man or woman on the street who may never have been to a gallery and indeed who might never have thought before of possessing a piece of art until induced to do so on seeing appellants' works. The sidewalks of the City must be available for appellants to reach their public audience. The City has thus failed to meet the requirement of demonstrating alternative channels for appellants' expression.

On the basis of this record before us, the City's requirement that appellants be licensed in order to sell their artwork in public spaces constitutes an unconstitutional infringement of their First Amendment rights. The district court abused its discretion in denying the preliminary injunction.

Finally, we note that the district court was similarly incorrect in its rejection of appellants' argument under the Equal Protection Clause of the Fourteenth Amendment. The requirement that appellants' art cannot be sold or distributed in public areas without a general vendors license, while written material may be sold and distributed without a license, must fall for the same reasons

outlined above. Since the ordinance does impermissibly impinge on a fundamental right, the district court incorrectly dismissed the equal protection argument under a rational basis test.

Accordingly, the judgment of the district court is reversed.

MAHONEY, *Circuit Judge*, concurring in the judgment and partly in the opinion of the Court:

I concur in the judgment of the Court and in the opinion of the Court except for its discussion of the Equal Protection Clause of the Fourteenth Amendment.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AS AMENDED, DATED OCTOBER 26, 1995

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ROBERT BERY, JAMES ALBERT HARRIS, ANNE REISS, RICARDO ANTONIO PASCUAL, ARTISTS FOR CREATIVE EXPRESSION ON THE SIDEWALKS OF NEW YORK CITY,

Plaintiffs,

- against -

CITY OF NEW YORK, RUDOLPH GIULIANI, MAYOR, CITY OF NEW YORK, WILLIAM BRATTON, CHIEF, NEW YORK CITY POLICE DEPARTMENT, ROBERT MORGENTHAU, DISTRICT ATTORNEY-NEW YORK COUNTY, RICHARD A. BROWN, DISTRICT ATTORNEY-QUEENS COUNTY, WILLIAM L. MURPHY, DISTRICT ATTORNEY-RICHMOND COUNTY, CHARLES H. HYNES, DISTRICT ATTORNEY-KINGS COUNTY, ROBERT F. JOHNSON, DISTRICT ATTORNEY-BRONX COUNTY, ALFRED C. CERULLO III, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, HENRY J. STERN, COMMISSIONER, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, MARILYN GELBER, COMMISSIONER OF THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK,

Defendants.

ROBERT LEDERMAN, JODI BOGUS, KNUT MASCO, ALEXIS PORTILLA, and ARTHUR ROBBINS,

Plaintiffs,

- against-

THE CITY OF NEW YORK, RUDOLPH GIULIANI, MAYOR OF THE CITY OF NEW YORK, in his individual and official capacities, THE NEW YORK CITY POLICE DEPARTMENT, WILLIAM BRATTON, COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT, in his individual and official capacities, DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK, ALFRED C. CERULLO, III, COMMISSIONER OF DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK, in his individual and official capacities, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, and ANNE J. McCARTHY, EXECUTIVE DIRECTOR OF THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, in her individual and official capacities,

Defendants.

As Amended October 26, 1995.

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94 Civ. 4253 (MGC); 94 Civ. 7216 (MGC)

COUNSEL: For Plaintiffs Robert Bery, et al.: NOAH A. KINIGSTEIN, Esq., New York, New York. CAROL NOVACK, Esq., New York, New York.
For Plaintiffs Robert Lederman, et al.: DEWEY BALLANTINE, New York, New York, By: Wayne A. Cross, Esq., Randall Fox, Esq. VOLUNTEER LAWYERS FOR THE ARTS, Of Counsel, New York, New York.

For Defendants: PAUL A. CROTTY, Corporation Counsel of the City of New York, New York, New York, By: Robin Binder, Esq., Gabriel Taussig, Esq.

CEDARBAUM, J.

Does a content-neutral municipal ordinance of general application violate the First and Fourteenth Amendments because it incidentally restricts the sale of art on the sidewalks of New York City? Plaintiffs in these related cases are artists who sell their original paintings on public sidewalks and an artists' advocacy organization. They move for a preliminary injunction prohibiting the enforcement against them of the New York City, General Vendors Law (Administrative Code of the City of New York § 20-452 et seq.) on the grounds that the application of the ordinance to their activities violates their rights to freedom of

expression and equal protection of the laws under the First and Fourteenth Amendments to the Constitution. Plaintiffs do not contend that their paintings are in any respect political, but rather take the position that all works of fine art are forms of expression which fall under the First Amendment's protection of "speech," and that that protection is absolute.

Art is enormously important in advancing civilization. How the flowering of art is best encouraged in our society is not an issue for the court. These cases do not involve censorship of any kind. There is no suggestion that, in enacting the ordinance, the City Council was motivated by any animus against artists or that the sale of art was a targeted activity. The only question is whether the incidental effect on artists of a general local regulation of all street sales violates the Constitution of the United States. For the reasons discussed below, plaintiffs' motions are denied.

Background

The New York City General Vendors Law (the "Ordinance") provides:

> It shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter, except that it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by

> any other provision of this code, to vend such without obtaining a license therefor.

Admin. Code of the City of N.Y. § 20-453. The term "general vendor" is defined as:

> A person who hawks, peddles, sells, leases or offers to sell or lease at retail, goods or services, including newspapers, periodicals, books, pamphlets or other similar written matter in a public space.

Id. § 20-452(b).

Amendment I of the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1]

Plaintiffs are artists who sell or desire to sell their original works on public sidewalks. Most of the plaintiffs have been arrested or threatened with arrest, have received summonses, have been fined, and have had their works confiscated for violating the Ordinance.[2]

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[1] The First Amendment's protection of freedom of speech and freedom of the press applies to the states through the Fourteenth Amendment. Schneider v. Irvington, 308 U.S. 147, 84 L. Ed. 155, 60 S. Ct. 146 (1939).

[2] One plaintiff, Anne Reiss, has not sold her work on the public sidewalks, but alleges that she would like to sell her work on the public sidewalks, but has not done so because she fears the consequences of doing so.

The City has imposed a limit of 853 on the number of licenses to be issued under the Ordinance.[3] See N.Y. City Admin. Code § 20-459; Binder Decl. ¶ 11. There are between 500 and 5,000 applicants on the waiting list to obtain licenses at any given time, and the wait to obtain one is expected to be between three and five years. (Richard Schrader Aff. ¶¶ 7, 9 (Ex. D to Lederman Supp. Aff.)) None of the plaintiffs in any of the actions appears to be on the waiting list at the present time.[4]

In addition to their First Amendment attack on the Ordinance, plaintiffs contend that the exemption of sellers of "newspapers, periodicals, books, pamphlets or other

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[3] N.Y. Gen. Bus. L. § 32(1) provides that New York residents who are veterans of any war or who have served in the United States armed forces overseas "shall have the right to hawk, peddle, vend and sell goods, wares or merchandise or solicit trade upon the streets and highways within the county of his or her residence, as the case may be, or if such county is embraced wholly by a city, within such city, by procuring a license for that purpose to be issued as herein provided." In order to comply with this statute, the Department of Consumer Affairs ("DCA") has adopted a policy that any veteran who wishes to obtain a license will be issued one regardless of the 853 license limit. As of October 21, 1994, 340 licenses had been issued to veterans over and above the limit. Thus, the actual number of licenses in effect is approximately 1,193. (See Binder Decl. ¶ 11 n.7.)

[4] Some plaintiffs state that when they inquired about applying for a license, they were told by the DCA that the waiting list was closed and they should inquire at a later date. (Bogus Aff. ¶ 6; Lederman Aff. ¶ 12.) Others state that they were told by DCA employees that artists were not required to have licenses. (Smolinsky Aff. ¶ 3; Robbins Aff. ¶ 5.) Another states that she didn't apply for a license because licensed vendors and other artists told her that licenses for artists were unobtainable. (Portilla Aff. ¶ 4.)

similar written matter" from the licensing requirement deprives artists of the equal protection of the laws and thus violates that clause of the Fourteenth Amendment.

Standard for Preliminary Injunction

To obtain a preliminary injunction, plaintiffs must show that they are "likely to suffer possible irreparable injury" and "either (1) a likelihood of success on the merits of [their] case or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in [their] favor." Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990) (citation and internal quotation marks omitted). In these cases, the two prongs of the threshold showing required for injunctive relief merge into one. Since violation of constitutional rights is the irreparable injury asserted, see Mitchell v. Cuomo, 748 F.2d 804 (2d Cir. 1984), in order to show irreparable injury, plaintiffs must show likelihood of success on the merits.

Does the Ordinance Violate Plaintiffs' First Amendment Rights?

There are few cases which discuss whether the First Amendment prohibits application of a general vending licensing scheme to the sale of works of fine art on public property. New York state courts have decided several cases under the Ordinance. The New York City Criminal Court dismissed a charge of violating the Ordinance against Robert Bery, one of the plaintiffs in these actions. See People v. Bery, N.Y.L.J., May 20, 1994, at 22. The court concluded that "the licensing requirement is inapplicable to this case based on the First Amendment rights of the

defendant. Not only did the defendant's work express a clear political viewpoint but, in addition, some of his work included the written word . . . ." Id.[5] In another case, the New York City Criminal Court held that the Ordinance did not violate the equal protection rights of an artist who sold his own paintings of floral pastels in the style of Rene Magritte on the city sidewalks. See People v. Milbry, 140 Misc.2d 476, 530 N.Y.S.2d 928 (N.Y. City Crim. Ct. 1988). In Milbry, the court held that under the test set forth in United States v. O'Brien, 391 U.S. 367, 376-77, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), there is no First Amendment bar to the inclusion of artists in a general licensing requirement for street vendors, and also held that the exemption for sellers of written matter did not deprive sellers of paintings of equal protection of the laws under the Fourteenth Amendment. Milbry, 530 N.Y.S.2d at 930-31.

One other state court has dealt with the issue of First Amendment protection for the street sale of art in a case involving facts similar to those presented in these cases. In San Francisco Street Artists Guild v. Scott, 37 Cal. App. 3d 667, 112 Cal. Rptr. 502 (Cal. Ct. App. 1974), artists and craftspeople who wished to sell works (including paintings and sculptures) of their own creation on the sidewalks of San Francisco were denied the licenses required by a city ordinance. The California Court of Appeal found that the works were not "so likely to communicate expression of the type of ideas held sacred by the First Amendment as to vest them with such broad rights as are held by pamphleteers or purveyors of newspapers." 112 Cal. Rptr. at 505. The court therefore refused to "enlarge" the First Amendment to

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[5] Bery does not claim in these cases that his art conveys a political message.

protect the commercial activity of selling arts and crafts on public sidewalks. Id.

Plaintiffs argue that Milbry and San Francisco Street Artists are not persuasive because there was no indication in those cases that artists were unable to obtain licenses, whereas in this case, plaintiffs allege that they are unable to obtain licenses. (Lederman Pl.'s Reply Mem., at 3-4.)

The text of the First Amendment explicitly refers to "speech" and "the press." The precise nature of First Amendment protection for painting and sculpture with no verbal elements has not been addressed by the federal courts. Although several opinions include generalized statements concerning the protection of artistic works by the First Amendment, see Miller v. California, 413 U.S. 15, 34, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent."); Serra v. United States Gen. Servs. Admin., 847 F.2d 1045, 1048 (2d Cir. 1988); Piarowski v. Illinois Community College, 759 F.2d 625, 628 (7th Cir. 1985), those cases did not present the issues raised here.

There is some expressive content in works of fine art, just as there is in works of applied or decorative art. Both the silversmith and the sculptor whose works are for sale are seeking to reach others. But the development of First Amendment protection for symbolic speech has evolved primarily from judicial concern about government censorship. With respect to regulations which have no purpose or effect to censor content, it is much more

difficult to identify the extent, if any, of First Amendment protection for activity which is not verbal. While in certain circumstances works of art may be "protected" by the First Amendment, it does not follow that the City violates the First Amendment whenever it regulates activity in public areas and incidentally frustrates the desires of some artists to sell their work in such places. In general, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991) (quoting United States v. O'Brien, 391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968)).

Plaintiffs do not distinguish between content-based and content-neutral regulation. Most of the cases cited by plaintiffs which mention First Amendment protection for artistic expression involved challenges to censorship, i.e., content-based regulations or government action. See Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973); Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir.), cert. denied, 474 U.S. 1007, 88 L. Ed. 2d 460, 106 S. Ct. 528 (1985). The only case offered by plaintiffs in support of First Amendment protection for non-verbal artistic expression which involved a content-neutral municipal regulation is Ward v. Rock Against Racism, 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). The plaintiffs in that case challenged a New York City Ordinance that required any musical performer who performed in the Central Park bandshell to use sound equipment and a sound technician provided by the City. The Supreme Court rejected the attack on the constitutionality of the regulation.

The distinction between content-based and content-neutral regulation is important in First Amendment jurisprudence. Content-based regulation is subject to strict scrutiny because a regulation that discriminates on the basis of content is a "red flag" indicating that the government intends to censor a particular message. Content-neutral regulations, on the other hand, are subjected to a more lenient level of scrutiny. The Supreme Court teaches that a content-neutral government regulation will be upheld if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. 367, 376-77, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968).

There is no question that regulation of activities in public areas is within the City's constitutional power. The City's interest in keeping the public streets free of congestion for the convenience and safety of its citizens is an "important or substantial" interest. The regulation furthers that interest and is unrelated to the suppression of free expression. Regulations that burden speech incidentally are "no greater than essential, and therefore [are] permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 688-89, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985); see also Ward v. Rock Against Racism, 491 U.S. at 801.

The limit of 853 licenses was established when the City Council enacted Local Law No. 50 of 1979, which amended Section 20-459(a) of the Administrative Code. In enacting this law, the City Council found that "a limit on the total number of general vendor licenses should be established, because the business of general vending is intimately connected with problems of congestion on streets and sidewalks, and because an increase in the number of general vendors would worsen those conditions." L.L. 50/1979, § 1. The City's goal in setting the license limit in 1979 was to prevent an increase in congestion. Thus, the incidental restriction on artists' freedom of expression caused by the license limit is permissible under O'Brien since the City's goal of keeping the public sidewalks free of congestion would be achieved less effectively in the absence of the regulation.

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988), cited by plaintiffs, demonstrates a concern about government censorship, which is not present in these cases. City of Lakewood invalidated a newsrack licensing ordinance which gave municipal officials considerable discretion to deny licenses. Although that case involved a regulation that was content-neutral on its face, the concern that licensing officials would abuse their discretion to deny licenses on the basis of content was the reason for the conclusion that the First Amendment had been violated. See City of Lakewood, 486 U.S. at 763-64. A licensing ordinance that limited the discretion of officials to license newsstands and newsracks was upheld in Graff v. City of Chicago, 9 F.3d 1309, 1317-19 (7th Cir. 1993), cert. denied, 128 L. Ed. 2d 464, 114 S. Ct. 1837 (1994). There is no evidence that the licenses required by the Ordinance

are issued on any but a "first-come, first-served" basis. See People v. Milbry, 140 Misc. 2d 476, 530 N.Y.S.2d 928, 930 (N.Y. City Crim. Ct. 1988). Thus, there is no threat of censorship through the abuse of discretion by licensing officials.

Plaintiffs also point to the recent Supreme Court decision in City of Ladue v. Gilleo, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994) for the proposition that a content-neutral regulation may violate the First Amendment by prohibiting "too much protected speech." Id. at 44. The municipal ordinance in Ladue was not a general regulation. It was explicitly limited to signs, a medium of verbal expression, and it prohibited the display of signs on private residential property. Thus, the ordinance directly limited the right of citizens to "speak" on their own property. Ladue at 49. Cf. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (upholding ordinance prohibiting the posting of signs on public property).

Plaintiffs argue that the cases at bar are analogous to Ladue because the practical effect of the Ordinance is to completely prohibit the sale of art on the public streets and sidewalks. Because the Ladue ordinance was directed at speech and applied to messages displayed on private property, the Ladue ordinance was unlike the Ordinance of New York City in critical respects. Ladue does not change the First Amendment analysis established by O'Brien. Unlike the plaintiffs in Ladue, New York City's street artists are entirely free to sell their works on their own property.

Plaintiffs do rely on some cases that involved content-neutral general regulations with an incidental effect on expression. Plaintiffs cite cases that hold that the sale of merchandise that bears a message expressing the seller's beliefs is a protected activity under the First Amendment. See Gaudiya Vaishnava Soc'y v. City of San Francisco, 952 F.2d 1059 (9th Cir. 1991), cert. denied, 504 U.S. 914, 118 L. Ed. 2d 555, 112 S. Ct. 1951 (1992); One World One Family Now v. City of Key West, 852 F. Supp. 1005, 1008 (S.D. Fla. 1994) (granting preliminary injunction on ground that plaintiffs demonstrated substantial likelihood that "the sale of message-bearing T-shirts will be found to be fully protected First Amendment activity"); People v. Krebs, 54 Misc.2d 578, 282 N.Y.S.2d 996 (N.Y. City Crim. Ct. 1967). The expression in those cases, however, consisted of words. Moreover, the words stated political or religious views. Items bearing words that express political or religious views are much closer to the heartland of First Amendment protection of "speech" than the apolitical paintings in these cases.

When a regulation is content-neutral, courts engage in a balancing test to determine whether the impact on freedom of expression outweighs the government's interest in the regulation. See generally Laurence H. Tribe, American Constitutional Law § 12-23 (2d ed. 1988); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46 (1987). The government interest required to justify a general content-neutral regulation which incidentally interferes with nonverbal expression need not be as substantial as the governmental interest required for direct interference with "pure speech." East Hartford Educ. Ass'n v. Board of Educ. of East Hartford, 562 F.2d 838, 858 (2d Cir. 1977) (teacher's refusal to wear a tie as a view of life

and society was a vague message which was "close to the 'conduct' end of the 'speech-conduct' continuum"). Although some art may be very close to "pure speech," see, e.g., Sefick v. City of Chicago, 485 F. Supp. 644 (N.D. Ill. 1979) (display of life-size plaster figures with tape recorded dialogue satirizing mayor's snow removal efforts), plaintiffs' art does not carry either words or the particularized social and political messages upon which the First Amendment places special value. See Close v. Lederle, 424 F.2d 988, 989-90 (1st Cir.) (refusing to extend cases dealing with students' rights to hear unpopular speakers to artist's claim that he had a right to exhibit works in University building on ground that those cases "involved a medium and subject matter entitled to greater protection than plaintiff's art"), cert. denied, 400 U.S. 903, 27 L. Ed. 2d 140, 91 S. Ct. 141 (1970); San Francisco Street Artists Guild v. Scott, 37 Cal. App. 3d 667, 112 Cal. Rptr. 502, 505 (Cal. Ct. App. 1974).

Plaintiffs have not shown that the general content-neutral Ordinance as it incidentally affects artists who wish to sell their apolitical paintings on the sidewalks of New York unconstitutionally interferes with their freedom of speech under the First and Fourteenth Amendments.

Equal Protection

When a statute neither impinges on a fundamental right, such as freedom of speech, nor uses a suspect classification, such as race or gender, it will not be found to violate the Equal Protection Clause of the Fourteenth Amendment as

long as it bears a rational relation to a legitimate governmental purpose. Regan v. Taxation With Representation of Washington, 461 U.S. 540, 547, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983); Story v. Green, 978 F.2d 60, 63-64 (2d Cir. 1992) (applying rational basis standard to statute that repealed exemption of veterans from N.Y. General Business Law).

Since, as discussed above, the Ordinance does not impermissibly impinge upon plaintiffs' First Amendment rights, its different treatment of the sale of written matter and the sale of art need only meet rational basis scrutiny. The Ordinance exempts only sellers of "newspapers, periodicals, books, pamphlets or other similar written matter." Such written matter is the heartland of the First Amendment.[6] Because art is farther from the core than the written word, the City's decision to exempt sellers of written matter cannot be seen as irrational. Indeed, it shows the rational desire of the City Council to avoid the possibility of violating the First Amendment. Therefore, the City's vending ordinance does not violate the Equal Protection Clause of the Fourteenth Amendment.

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[6] "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

Conclusion

Without likelihood of success on the merits of their constitutional challenge, plaintiffs do not show irreparable harm. Accordingly, for the reasons discussed above, plaintiffs' motions for a preliminary injunction are denied.

SO ORDERED.

Dated: New York, New York
October 26, 1995

/s/ Miriam Goldman Cedarbaum
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 22, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT BERRY, JAMES ALBERT HARRIS, ANNE REISS, RICARDO ANTONIO PASCUAL, ARTISTS FOR CREATIVE EXPRESSION ON THE SIDEWALKS OF NEW YORK CITY,

Plaintiffs,

- against -

CITY OF NEW YORK, RUDOLPH GIULIANI, MAYOR, CITY OF NEW YORK, WILLIAM BRATTON, CHIEF, NEW YORK CITY POLICE DEPARTMENT, ROBERT MORGENTHAU, DISTRICT ATTORNEY-NEW YORK COUNTY, RICHARD A. BROWN, DISTRICT ATTORNEY-QUEENS COUNTY, WILLIAM L. MURPHY, DISTRICT ATTORNEY-RICHMOND COUNTY, CHARLES H. HYNES, DISTRICT ATTORNEY-KINGS COUNTY, ROBERT F. JOHNSON, DISTRICT ATTORNEY-BRONX COUNTY, ALFRED C. CERULLO III, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, HENRY J. STERN,

COMMISSIONER, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, MARILYN GELBER, COMMISSIONER OF THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK,

Defendants.

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94 Civ. 4253 (MGC)

APPEARANCES:

NOAH A. KINIGSTEIN, Esq.
Attorney for Plaintiffs
315 Broadway, Suite 200
New York, New York 10007

CEDARBAUM, J.

Plaintiffs are artists who sell their original paintings on public sidewalks and an artists' advocacy organization. Plaintiffs move for a preliminary injunction prohibiting the enforcement against them of the New York City General Vendors Law (Administrative Code of the City of new York § 20-452 et seq.) on the grounds that the application of the ordinance to their activities violates their rights to freedom of expression and equal protection of the laws under the First and Fourteenth Amendments to the

Constitution. Defendants cross-move for summary judgment.

I have previously denied plaintiffs' motion. See Bery v. City of New York, No. 94 Civ. 4253 (S.D.N.Y. Oct. 24, 1995), notice of appeal filed, (Oct. 26,. 1995). Plaintiffs have not set forth specific facts showing that there is a genuine issue of material fact for trial. See Fed. R. Civ. P. 56(e). Therefore, for the reasons stated in my opinion of October 24, defendants' motion for summary judgment is granted.

SO ORDERED.

Dated: New York, New York
January 22, 1996

/s/ Miriam Goldman Cedarbaum
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED FEBRUARY 20, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT BERY, JAMES ALBERT HARRIS, ANNE REISS, RICARDO ANTONIO PASCUAL, ARTISTS FOR CREATIVE EXPRESSION ON THE SIDEWALKS OF NEW YORK CITY,

Plaintiffs,

- against -

CITY OF NEW YORK, RUDOLPH GIULIANI, MAYOR, CITY OF NEW YORK, WILLIAM BRATTON, CHIEF, NEW YORK CITY POLICE DEPARTMENT, ROBERT MORGENTHAU, DISTRICT ATTORNEY-NEW YORK COUNTY, RICHARD A. BROWN, DISTRICT ATTORNEY-QUEENS COUNTY, WILLIAM L. MURPHY, DISTRICT ATTORNEY-RICHMOND COUNTY, CHARLES H. HYNES, DISTRICT ATTORNEY-KINGS COUNTY, ROBERT F. JOHNSON, DISTRICT ATTORNEY-BRONX COUNTY, ALFRED C. CERULLO III, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, HENRY J. STERN, COMMISSIONER, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, NEW YORK CITY

DEPARTMENT OF PARKS AND RECREATION, MARILYN GELBER, COMMISSIONER OF THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK,

Defendants.

JUDGMENT
94 Civ. 4253 (MGC)

Plaintiffs having moved for a preliminary injunction prohibiting the enforcement against them of the New York City General Vendors Law (Administrative Code of the City of New York Sec. 20-452 et seq.) on the grounds that the application of the ordinance to their activities violates their rights to freedom of expression and equal protection of the laws under the First and Fourteenth Amendments to the Constitution; and Defendants having cross-moved for summary judgment; and the said motions having come before the Honorable Miriam Goldman Cedarbaum, United States District Judge, and the Court thereafter on October 24, 1995, having rendered its Amended Memorandum Opinion (75631) denying Plaintiffs' motion for a preliminary injunction, and; the Court thereafter on January 22, 1996, having rendered its Memorandum Opinion (76022) and Order, granting the Defendants' motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That the Plaintiffs' motion for a temporary injunction be and it is hereby denied for the reasons stated in the Court's

Amended Memorandum Opinion (75631), of October 24, 1995; and it is further,

ORDERED, that Defendants' motion for summary judgment be and it is hereby granted; accordingly, the Complaint is hereby dismissed.

Dated: New York, New York
February 20, 1996

JAMES M. PARKISON
Clerk of Court

By:

/s/
Deputy Clerk

DECISION ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 27, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT. BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of one thousand nine hundred and ninety-six.

PRESENT: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,

Circuit Judge,*

HONORABLE ROBERT L. CARTER,

District Judge.**

ROBERT BERY, JAMES ALBERT HARRIS, ANNE REISS, RICARDO ANTONIO PASCUAL, ARTISTS FOR CREATIVE EXPRESSION ON THE SIDEWALKS OF NEW YORK CITY, ROBERT LEDERMAN, JODI BOGUS, KNUT MASCO, ALEXIS PORTILLA and ARTHUR ROBINS,

Plaintiffs-Appellants,

v. 95-9089 (L), 95-9131, 96-7137

CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor, City of New York; WILLIAM BRATTON, Chief, New

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* The Honorable Daniel J. Mahoney, who was a member of the panel, died on October 23, 1996, and the appeal is being decided by the remaining two members of the panel, who are in agreement. See Local Rule § 0.14 (b).

** The Honorable Robert L. Carter, United States District Court for the Southern District of New York, sitting by designation.

York City Police Department; ROBERT MORGENTHAU, District Attorney-New York County; RICHARD A.BROWN, District Attorney-Queens County; WILLIAM L. MURPHY, District Attorney-Richmond County; CHARLES H. HYNES, District Attorney-Kings County; ROBERT F. JOHNSON, District Attorney-Bronx County; ALFRED C. CERULLO, III, Commissioner of New York City Department of Consumers Affairs, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS; HENRY J. STERN, Commissioner, New York City Department of Parks & Recreation; MARILYN GERBER, Commissioner of the New York City Department of Environmental Protection of the City of New York; ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and ANNE J. MCCARTHY, Executive Director of the Environmental Control Board of the City of New York, in her individual and official capacities,

Defendants-Appellees.

On October 10, 1996, this Court held that to the extent the provisions of §§ 20-452 et seq., of New York City's Administrative Code prohibit visual artists from exhibiting, selling, or offering their work for sale in public places in New York City without first obtaining a general vendor's license, they do not pass constitutional muster. Based on this holding, we held that plaintiffs-appellants should have been granted a preliminary injunction prohibiting the enforcement of these provisions.

Also at issue on the appeal was the district court's grant of summary judgment in favor of the City. Because the reasoning in our October 10th opinion applies equally to

the City's motion for summary judgment, we reverse the district court's order of January 22, 1996, which granted the City's motion.

/s/
Ellsworth A. Van Graafeiland, U.S.C.J.

/s/
Robert L. Carter, U.S.D.J.

No. 96-1359

Supreme Court, U.S.
FILED
SEP 26 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor, City of New York; WILLIAM BRATTON, Chief, New York City Police Department; ROBERT MORGENTHAU, District Attorney–New York County; RICHARD A. BROWN, District Attorney–Queens County; WILLIAM L. MURPHY, District Attorney–Richmond County; CHARLES H. HYNES, District Attorney–Kings County; ROBERT F. JOHNSON, District Attorney–Bronx County; ALFRED C. CERULLO, III, Commissioner of New York City Department of Consumer Affairs; NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS; HENRY J. STERN, Commissioner, New York City Department of Parks & Recreation; MARILYN GELBER, Commissioner of the Department of Environmental Protection of the City of New York; ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and ANNE J. MCCARTHY, Executive Director of the Environmental Control Board of the City of New York,

Petitioners,

—v.—

ROBERT BERY, JAMES ALBERT HARRIS, ANNE REISS, RICARDO ANTONIO PASCUAL, ARTISTS FOR CREATIVE EXPRESSION ON THE SIDEWALKS OF NEW YORK CITY, ROBERT LEDERMAN, JODI BOGUS, KNUT MASCO, ALEXIS PORTILLA and ARTHUR ROBINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENTS ROBERT LEDERMAN, JODI BOGUS, KNUT MASCO, ALEXIS PORTILLA AND ARTHUR ROBINS

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly conclude that a local vendor licensing regulation violated the First and Fourteenth Amendments where the regulation operated as a *de facto* ban on the display and sale of visual art and was not narrowly tailored to promote a significant governmental interest?

2. Did the Court of Appeals properly conclude that a local vendor licensing regulation violated the Equal Protection Clause of the Fourteenth Amendment where the regulatory scheme discriminated between written expression on one hand and visual expression on the other hand?

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ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Vendors Law,
New York City Admin. Code § 20-452 et seq.

§ 20-465 **Restrictions on the placement of vehicles, pushcarts and stands; vending in certain areas prohibited.** a. No general vendor shall engage in any vending business on any sidewalk unless such sidewalk has at least a twelve-foot wide clear pedestrian path to be measured from the boundary of any private property to any obstructions in or on the sidewalk, or if there are no obstructions, to the curb. In no event shall any pushcart or stand be placed on any part of a sidewalk other than that which abuts the curb.

b. No general vendor shall occupy more than eight linear feet of public space parallel to the curb in the operation of a vending business and, in addition, no general vendor operating any vending business on any sidewalk shall occupy more than three linear feet to be measured from the curb toward the property line.

c. No vending vehicle, pushcart, stand, goods or any other item related to the operation of a vending business shall touch, lean against or be affixed permanently or temporarily to any building or structure including, but not limited to lamp posts, parking meters, mail boxes, traffic signal stanchions, fire hydrants, tree boxes, benches, bus shelters, refuse baskets or traffic barriers.

d. No vending pushcart, stand or goods shall be located against display windows of fixed location businesses, nor shall they be within twenty feet from an entranceway to any building, store, theatre, movie house, sports arena or other place of public assembly.

e. No general vendor shall vend within any bus stop or taxi stan, or within ten feet of any driveway, any subway entrance or exit, or any corner. For purposes of this subdivision, ten feet from any corner shall be measured from a point where the property line on the nearest intersecting block face, when extended, meets the curb.

* * *

g. No general vendor shall vend on any street which is a C4, C5, or C6 zoning district, or in the area bounded on the east by Second Avenue, on the south by Thirtieth Street, on the west by Ninth Avenue and Columbus Avenue and on the north by Sixty-fifth Street, except that as chairperson of the street vendor review panel established pursuant to section 20-465.1 of this subchapter, the commissioner of the department of business services or his or her designee may receive

applications from any person, group, organization or other entity to permit general vendors on any street within said area or said zones, or to prohibit general vendors on any other street. Such applications shall be considered by the street vendor review panel in accordance with the procedures enumerated in section 20-465.1 of this subchapter.

* * *

k. Where exigent circumstances exist and a police officer or other authorized officer or employee of any city agency gives notice to a general vendor to temporarily move from any location such general vendor shall not vend from such location. For the purposes of this subdivision, exigent circumstances shall include, but not be limited to, unusually heavy pedestrian or vehicular traffic, existence of any obstructions in the public space, an accident, fire or other emergency situation, a parade, demonstration or other such event or occurrence at or near such location.

* * *

m. No general vendor shall vend over any ventilation grill, cellar door, manhole, transformer vault, or subway access grating.

n. No general vendor shall vend using the surface of the sidewalk, or a blanket or board placed immediately on the sidewalk or on top of a trash receptacle or cardboard boxes to display merchandise. No general vendor display may exceed five feet in height from ground level. The display

may not be less than twenty-four inches above the sidewalk where the display surface is parallel to the sidewalk, and may not be less than twelve inches above the sidewalk where the display surface is vertical. Where a rack or other display structure is placed on top of or above a table or other base, the size of the base shall not be less than the size of the display structure placed thereon. Nothing shall be placed on the base so as to exceed the size limitations contained in this section. No general vendor shall use any area other than that area immediately beneath the surface of the display space for the storage of items for sale.

* * *

q. No general vendor shall vend: 1. within twenty feet from sidewalk cafes; 2. within five feet from (a) bus shelters, (b) newstands, (c) public telephones or (d) disabled access ramps; and 3. within ten feet from entrances or exits to buildings which are exclusively residential at the street level.

STATEMENT OF THE CASE

Respondents Robert Lederman, Jodi Bogus, Knut Masco, Alexis Portilla and Arthur Robins are individual artists who sell their paintings, sculpture and prints on the public sidewalks of New York City (the "City"). JA 121, 136, 243, 255, 263.[1] They commenced this action because the City's general vendor licensing scheme has placed them in an untenable position. Respondents can allow themselves to be silenced by forsaking their expression in light of the impossibility of obtaining general vendor licenses required by the City, or they can engage in their expression and subject themselves to arrest, confiscation (and often destruction) of their original works of art, $250 tickets and police threats.

The City has two regulatory structures addressed to vending on its public sidewalks. One is the licensing requirement at issue here which makes it unlawful to sell in public spaces any non-food items, be they tube socks, batteries or original Vermeers, without a license. N.Y. City Admin. Code § 20-453. The other regulates the time, place and manner of how a vendor may set up a display. N.Y. City Admin. Code § 20-465.

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[1] References to the Appendix to the Petition for Certiorari are indicated by the letter "A" followed by the relevant page number in the Appendix. References to the Joint Appendix filed in the Court of Appeals are indicated by the letters "JA" followed by the relevant page numbers.

As part of the first regulatory structure, the City requires a general vendor license and imposes an arbitrary limit of 853 licenses. Rather than arriving at the 853 number after a rational analysis, the City settled on its limit because exactly that many licenses happened to exist on September 1, 1979. N.Y. City Admin. Code § 20-459(a). All of the 853 licenses have been taken, and their holders can, and usually do, renew them from year to year. N.Y. City Admin. Code § 20-457 (a); JA 221. The City has admitted that respondents cannot now obtain general vendor licenses, JA 297 (Answer, ¶ 18), and respondents' experiences have borne out that fact. JA 123-24, 205, 216, 244, 263. There is no question that the general vendor licensing requirement imposes an effective ban on the sale of respondents' original art on the sidewalks of the City.[2]

Although the City's stated purpose for the limit on the number of general vendor licenses is to reduce congestion, JA

---

[2] Notwithstanding this ban, as early as 1979, the City's licensing authority, the Department of Consumer Affairs, expressed the opinion that an artist's First Amendment rights precluded enforcement of the licensing scheme against him: "In the opinion of this Department it has been determined, as per the First Amendment, that if you only create and sell your own paintings and drawings within the City of New York you are not required to obtain a General Vendor License." JA 219. As recently as September 28, 1994, the City's Mayor Giuliani declared to an open forum that "I do recognize that artists have a First Amendment right to display and sell their art on the public streets of New York City." JA 122.

147 (L.L. 50/1979 § 1), the City does not impose an actual limit on the number of vendors who can sell in public spaces. Built into the City's regulation is an exemption that permits an unlimited number of persons to sell materials on the street without the need for a license, so long as those materials consist exclusively of "newspapers, periodicals, books, pamphlets or other similar written matter." N.Y. City Admin. Code § 20-453. Accordingly, vendors of used magazines or baseball cards are not so restricted as artists who sell their own creations. The City added this written matter exemption to the licensing regulation in 1982 because it believed it was "consistent with the principles of free speech and freedom of the press to eliminate restrictions on the vending of written matter." JA 147 (L.L 33/1982 § 1).

Also excluded from the City's licensing requirement are veterans of foreign wars and their spouses. Any number of these persons can obtain a unique vending license pursuant to state law and, with such licenses, can sell anything -- including original works of art -- on the City's sidewalks. N.Y. Gen. Bus. Law § 32 (McKinney 1988).

The City's second set of regulations, which is not challenged here, is addressed to the time, place and manner of vendor displays and applies to both licensed and unlicensed vendors, including vendors of written matter. Unlike a city-wide numerical cap on licenses, these regulations are addressed to preventing congestion on the streets. Pursuant to these regulations vendors are restricted to sidewalks that are 12 feet wide; they must keep their displays to no more than eight linear feet parallel to the curb and three linear feet

perpendicular to the curb; they may not allow their displays to abut other structures, including fire hydrants; and they must position their displays at least 20 feet from the entrance a buildings. N.Y. City Admin. Code § 20-465(a)-(d). In addition, the City has composed a list of streets on which vendors may not sell, and it has declared much of midtown Manhattan off limits to non-food vendors. N.Y. City Admin. Code § 20-465(g). These regulations further provide that in exigent circumstances -- such as unusually heavy pedestrian or vehicular traffic, obstructions in public spaces, accidents, fires or other emergency situations -- a general vendor is required to move his or her display upon notice from a police officer or other authorized employee of a City agency. N.Y. City Admin. Code § 20-465(k). These rules were "designed to prevent or minimize sidewalk and roadway congestion." JA 150.

Respondents do not have ready access to fora other than the public sidewalks for displaying and selling their works of art. JA 122. While New York is a city of galleries and museums, the space in those institutions is limited and usually reserved for a small number of highly prominent artists. Respondents thus turn to the sidewalks as a place where they can share their art with the public. In fact, the City's sidewalks have become a source of inspiration and ideas for respondents' art and have provided a means for direct communication with the viewing public that is not available elsewhere. JA 122-23, 204-5. Members of the public, in turn, are provided with the opportunity to view original art work and be exposed to its information and ideas

even if they would not be inclined to visit a museum or gallery. JA 122.

Respondents' ability to engage in their expression on the City's sidewalks has been curtailed by the City's requirement of an unobtainable license. Most obviously, they have been unable to share those works that have been confiscated by the police, and they have lost the opportunity to display and sell their art when they have been taken to jail for vending without a license. The effect of the City's enforcement of § 20-453 against respondents, however, has more subtle aspects. The fear of losing their works has led respondents to refrain from displaying their finest pieces, thereby depriving themselves and the public of the opportunity to engage in that communication. JA 205, 245. Other artists have simply been chilled from selling at all.

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because the Court of Appeals properly applied two established principles of First Amendment law. First, the guarantees of the First Amendment apply to a broad range of expression, including respondents' display and sale of their art. Second, the First Amendment will not suffer a regulation, like the City's, that is not narrowly tailored and serves as an effective city-wide ban on a form of expression.

I. Visual Art Is Protected by the First Amendment

Like the written or spoken word, visual art can communicate, enlighten, provoke, enrich and offend. There is no real doubt that, like verbal expression, visual expression is entitled to the protection of the First Amendment. While the language of the First Amendment refers to guarantees for "speech" and "press," this Court has not restricted the amendment's protections to a narrow interpretation of these terms. Accordingly, protection has been found for a broad array of expression, including music, film, theater, and other arts. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). In addition, this Court has not required that expression convey a particularized message in order to be entitled to the protection of the First Amendment. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995) (St. Patrick's Day parade itself, not just its constituent elements, constituted a form of expression).

Paintings, sculpture and other plastic arts, such as those practiced by respondents, are clearly forms of expression entitled to protection under the First Amendment. In fact, Jackson Pollock's splatter paintings have been featured by this Court as examples of expression that is "unquestionably shielded" (along with Arnold Schönberg's music and Lewis Carroll's Jabberwocky verse). *Hurley*, 115 S. Ct. at 2345. Like music and drama, the plastic arts have as their purpose the expression of ideas and emotions. Visual

art is one of the oldest forms of expression, predating (and eventually merging into) the written word as a means of communication. Visual art is a type of communication that has the ability to transcend the bounds of illiteracy and language limitations, conveying messages beyond the constraints of the written word. In other respects, visual art is inextricably connected to written words. The ancient Egyptians formulated their hieroglyphics out of artistic images; modern Chinese characters meld the pictorial and the linguistic; René Magritte painted words under his depiction of a pipe to instruct the reader/viewer that "this is not a pipe"; William Blake drew his poetry within and as part of colorful images of nature, humanity and deities. A painter's canvas or a sculptor's molded form embodies the creator's expression as does a writer's manuscript.

The expressive characteristics of visual art, and accordingly its protection under the First Amendment, have been recognized repeatedly by this Court. In addition to this Court's statements about Jackson Pollock's paintings in its unanimous decision in *Hurley*, it noted in *Miller v. California*, 413 U.S. 15, 34 (1973), that the "First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value." In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943), the Court described visual images as "a primitive but effective way of communicating ideas ... a short cut from mind to mind." And in *Joseph Burstyn*, 343 U.S. at 501, it wrote that artistic expression "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought." That visual

art is a protected form of expression was also recognized in *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625, 628 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985). The stained glass windows there at issue were found by the Seventh Circuit to make no political statement; rather, they constituted "art for art's sake." As such, they were nevertheless protected under the First Amendment's guarantees of both freedom of speech and freedom of the press.[3] *See also Contemporary Arts Ctr. v. Ney*, 735 F. Supp. 743, 744 (S.D. Ohio 1990) ("In the absence of a judicial finding that the [Robert Mapplethorpe] photographs in question are obscene, they are entitled to the protection of the First Amendment."); *Cernuda v. Heavey*, 720 F. Supp. 1544, 1549 (S.D. Fla. 1989) ("Artwork, like other forms of expression, is within the ambit of speech that receives First Amendment protection.").

In addition to the art itself, respondents' sale of their art is protected because it is inextricably intertwined with the expression. This Court has already held that removing the financial incentive for expression can offend the First Amendment where the result is less expression. Thus, in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988), it rejected a municipal permit scheme for newsracks

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[3] While some viewers may have inferred a racist or sexist message in the windows, the court did not base its decision on this possibility. Rather, "freedom of speech and of the press protected by the First Amendment has been interpreted to embrace the purely artistic as well as political expression." *Piarowski*, 759 F.2d at 628.

because the restriction on selling newspapers infringed the publisher's rights: "the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away." The Court took a realistic approach to the financial aspect of encouraging expression: "[t]he actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected. After all, 'liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Id.* at 768 (quoting *Ex Parte Jackson*, 96 U.S. 727, 733 (1878)).

Most recently, this Court recognized the relation between financial rewards and expression in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995). In that case, it struck down a federal prohibition on government employees' accepting honoraria for speeches and articles unrelated to their job responsibilities. The restriction did not prohibit speech, nor did it discriminate among speakers based on their views, yet "its prohibition on compensation unquestionably imposes a significant burden on expressive activity." *Id.* at 1014. Once again, the Court recognized that the practical result of banning remuneration for expression was less expression. Quoting Samuel Johnson, it noted "[n]o man but a blockhead ever wrote except for money." *Id.* at 1014 n.14 (citation omitted); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking state's "Son of Sam" law that required financial rewards from books relating to a convicted criminal's crimes to be paid to victims); *Joseph Burstyn*, 343 U.S. at 501-02 ("That books, newspapers, and magazines are

published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures." (footnote omitted)).

The City itself recognizes that the sale of expression is protected by the First Amendment. In creating the written matter exemption to its vendor licensing scheme, it specifically focused on *the sale* of written matter when it strove (albeit in too limited a manner) to remain "consistent with the principles of free speech and freedom of the press."

Furthermore, reducing expression by banning a financial incentive to engage in it impinges not only on the rights of the speaker, but also on those of the listener. In *National Treasury Employees*, this Court stated that "[t]he large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne." 115 S. Ct. at 1015 (internal citations omitted).

Respondents' works of art, and their sale of those works, fit squarely within the foregoing precedent. First, the First Amendment's guarantees clearly apply to visual art. Second, respondents' sale of their art is inextricably intertwined with their protected expression, for the removal of the financial incentive for their expression has led to less

expression: the City's *de facto* ban on respondents' selling their works of art has caused respondents to refrain from displaying and selling their art and to keep their best works away from the public eye for fear that they will be confiscated and destroyed. Section 20-453 clearly implicates respondents' First Amendment rights, and the Second Circuit's ruling appropriately preserves those rights.

II. The City's Effective Ban on a Form of Expression Runs Afoul of the First and Fourteenth Amendments

Section 20-453 of the City's Admin. Code impermissibly impinges respondents' rights because it concededly serves as an effective ban on their expression throughout the entire city. The result is that respondents must choose between the Scylla of silence and the Charybdis of arrest and confiscation when they engage in their expression without the unobtainable general vendor license.

The Ninth Circuit's decision in *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir.), *cert. denied*, 117 S. Ct. 554 (1996), does not represent a split among the circuits or even a split from the Second Circuit's decision below. First, consistent with the decision below, the Ninth Circuit reaffirmed an earlier decision that message-bearing t-shirts and their sale are entitled to the protection of the First Amendment. *Id.* at 1012 (citing *Gaudiya Vaishnava Soc'y v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990), *cert. denied*, 504

U.S. 914 (1992)). Second, the regulation at issue in *One World* was substantially different from the restriction challenged in the present action. The Ninth Circuit was not faced with an effective city-wide ban on a form of expression, whether in the guise of a licensing requirement or otherwise. Instead, it examined an effort by a municipality to zone creative t-shirt vendors by restricting them with respect to one area within the City of Honolulu. At most, that regulation is akin to New York City's designation (not challenged here) of a portion of midtown Manhattan as restricted to general vendors. See N.Y. City Admin. Code § 20-465(g). There is no basis for a claim that the circuits are split on issues raised below.

In analyzing the City's licensing requirement, the Court of Appeals below suggested that, because the scheme draws distinctions between written and pictorial forms of expression, it should be subject to a strict scrutiny analysis. A 17-18. The court did not reach that issue, however, because it found the regulation fails even under a less stringent standard: it is not narrowly tailored to serve a significant governmental interest, and it does not leave open ample alternative channels for communication.

Inconsistencies and exceptions in government regulations have caused this Court to question the interests asserted to justify them. Thus in *National Treasury Employees*, Justice O'Connor, concurring in part and dissenting in part, was led to doubt the governmental interest in the honoraria ban due to its "patchwork nature." 115 S. Ct. at 1022. In that case, the regulation that the Court

struck down was riddled with inconsistencies because federal "employees may receive honoraria for poems, but not for speeches on poetry. Employees may be compensated for writing chapters in books but not for writing the same piece if published as an article." *Id*; *see also City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994) ("[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place.").

The City's licensing requirement also suffers from a patchwork nature. It restricts the number of general vendor licenses, but not the number of vendors. In fact, as a result of the written matter exemption and the separate licenses for veterans, there is no limit to the number of vendors who can be present on the City's streets. The 853 licensed vendors can easily be outnumbered by a limitless number of written matter vendors. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) (striking down attempt to limit newsracks containing commercial handbills because, if the purpose was to limit the overall number of newsracks, newspapers were the greater culprit). The City's regulatory scheme allows the unlicensed sale of books that contain reproductions of original art, but bars such sale of the original works themselves. Moreover, under the City's definition, one presumably does not need a license to sell art consisting of enough words to constitute written matter, but does need a license if the art lacks sufficient words.

In marked contrast to the licensing scheme which does not affect the total number of vendors, the time, place and manner regulations found at § 20-465 of the City's Administrative Code actually address the matter of congestion on the City's streets and sidewalks. It is these regulations that ensure that doorways are clear, that the hydrants remain accessible, and that vendors move in exigent circumstances.[4]

The patchwork licensing scheme's effective ban on a form of expression cannot be excused on the claim that the task of differentiating between protected expression and everything else may at times be difficult. It is, of course, the legislative function to grapple with such issues in an effort to comply with constitutional dictates. New York State has sought to perform this legislative line-drawing function, for example, in determining who is an "artist" for purposes of qualifying for subsidized loft space. N.Y. Mult. Dwell. Law § 276 (McKinney 1996). The City has done the same in interpreting the bounds of its own regulations concerning its vendor licensing scheme. For purposes of applying the written matter exemption, the City has drawn a line allowing the unlicensed vending of "printed material which, taken in its entirety, seeks to express ideas or thoughts through the written word." JA 157, 196. In other words, the City decides (within the narrow category of written matter) what

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[4] These time, place and manner regulations, rather than the licensing requirement, were the subject of *Duchein v. Lindsay*, 345 N.Y.S.2d 53 (1st Dep't 1973), *aff'd*, 311 N.E.2d 508, *appeal dismissed*, 419 U.S. 809 (1974), which was cited in the Petition.

is expressive. Baseball cards, in the City's view, are sufficiently expressive through the written word to qualify for the exemption; calendars and maps are not. Though these specific comparisons may be flawed, the City cannot impose a ban on visual expression on the claim that distinctions between expressive and non-expressive material cannot be drawn.

Because the City's regulation imposes an effective city-wide ban on respondents' expression, *a fortiori*, it fails to leave open ample alternative channels for communication. The City cannot escape this requirement by glibly suggesting unrealistic alternatives, such as respondents' private property, for selling their art. It must leave open alternative *public* channels for communication. Thus in *Southeastern Promotions*, 420 U.S. at 556, private theaters were not considered an appropriate alternative when a production of the musical *Hair* was improperly excluded from a public theater. According to the Court, "[e]ven if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Id.* (quoting *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 163 (1939)); *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (ban on live entertainment in one town could not be justified by the existence of live entertainment in a neighboring town). The Court of Appeals properly concluded, based on these principles, that the City provides no public alternatives and

that, for this independent reason, the regulation failed to withstand even intermediate scrutiny. A 21-22.

In addition to violating the First Amendment, the City's licensing scheme runs afoul of the Fourteenth Amendment's Equal Protection Clause. "[W]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (citations omitted). As demonstrated above, the City's regulation clearly concerns speech-related activities, for respondents' sale of their art, just as a publisher's sale of newspapers or a theater's presentation of a film, raises the fundamental right of free speech. The City's regulation also discriminates among such speech-related activities by dividing protected expression into favored and disfavored categories. Under the written matter exemption, anyone who chooses to sell written materials, be they works in the "canon" of literature or baseball cards, may do so without a license. Respondent artists fall into the disfavored category. Because they express through the visual image, they can only sell their works if they posses the unobtainable general vendor license. For the reasons described above, this scheme is not finely tailored to promote a significant government interest. Rather, it serves to limit too much speech by exempting only some expression. *See City of Ladue*, 114 S. Ct. at 2039.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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Dated: March 26, 1997

Supreme Court, U.S.
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CLERK

No. 96-1359

In The

Supreme Court of the United States

October Term, 1996

CITY OF NEW YORK, *et al.*,

Petitioners,

vs.

ROBERT BERY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct when it held that art is protected by the First Amendment of the United States Constitution to the same extent as written expression?

2. Whether the Court of Appeals was correct in holding that the New York City General Vendors Law created a *de facto* ban on the legal display and sale of the respondents' artistic expression violated the respondents' constitutionally protected rights under the First Amendment to the United States Constitution?

3. Whether the Court of Appeals was correct in holding that the General Vendor's Law violated the respondents' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

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STATEMENT OF THE CASE

Respondents Bery, Harris, Reiss and Pascual, are all artists who have either sold their paintings or desire to sell their paintings and other artwork on the sidewalks of New York City.[1] (A6). Respondent Artists for Creative Expression on the Sidewalks of New York City (hereinafter "ACES") is an unincorporated advocacy group for artists and their supporters, which supports the rights of artists to display and sell their artwork on the streets of New York. (A6).

The individual artists Bery, Harris and Pascual have either been arrested, fined or imprisoned due to the display and sale of their artwork on the sidewalks of New York City. On such occasions the artists have also been subjected to having their art either confiscated, destroyed or harmed. Bery, Harris and Reiss have all attempted to obtain licenses to sell their work. However, they have been unable to obtain a license because none are being granted. Reiss is an artist who is chilled from displaying her artwork. (A28).

Violation of the license requirement is a misdemeanor punishable by fine and/or imprisonment as well as civil penalties, Administrative Code §§ 20-472(a) and (c)(1). If criminally convicted, the violator is subject to a fine of not less than $250 nor more than $1,000 and/or imprisonment of up to three months, Administrative Code § 20-472(a). Further, if found criminally liable the violator may be fined no less than $250 nor more than $1,000 together with a fine of $250 for each day of the unlicensed activity, Administrative Code § 20-472(c)(1). In addition, police officers are authorized to seize the items being sold, and the

1. Numbers in parentheses preceded by the letter "P" refer to pages in the Petition for Writ of Certiorari; "A" refers to pages in the appendix filed with the Petition for Writ of Certiorari; "JA" refer to pages in the Joint Appendix filed in the Court of Appeals.

seized items are subject to forfeiture, Administrative Code §§ 20-468 and 20-472(a). (A7-8).

In response to being arrested, imprisoned or fined and having their art confiscated, destroyed or damaged. These respondents brought a cause of action in the United States District Court for the Southern District of New York. Said cause of action challenged New York City's General Vendor Licensing Law, which requires artists to have a license to sell their artwork on the streets of New York, even though no licenses are available. (JA8). The respondents are unable to obtain licenses because there is a cap of 853 licenses granted. As a result, there is a waiting list of at least 5 years, comprised of between 500-5,000 applicants. (A8-9, A28-29). None of the respondents awaiting licenses will be able to obtain a license in the foreseeable future. Thus the cap creates a *de facto* ban on the ability of artists to sell their own artwork on the sidewalks of the City of New York at any time, in any place, in any manner. (A29).

While there exists the *de facto* ban and punitive regulations for violations of said licensing requirements, including arrest, fines, confiscation of artwork and imprisonment, there are also detailed regulations for *licensed* vendors which clearly outline the regulation of time, place and manner of sale, as well as which streets are prohibited from vendors. (JA36-42). In addition, there are clear restrictions for licensed vendors regarding the placement of vending stands, times of vending, duty of vendors, tax regulations, emergency procedures and other specific time, place, and manner restrictions, all of which have *not* been challenged by the respondents. (A7-8).

The *de facto* ban is based on the arbitrary number 853, making the "prospects of securing a license apparently nonexistent. A fact conceded [by the respondents] at oral argument." (A8-19).

It is conceded that the number of 853 has been fixed since 1979 and that the licensees have the right to renew. (A35). There is at present no way for an artist to legally sell his/her work on the sidewalks of New York without a license.

In opposition to the arbitrary cap of 853 for general vendors there is a bold exception for the vendors of "written matter", Administrative Code § 20-453. (A7). Said exception was adopted on May 11, 1982 by the City Council of New York when they adopted an amendment to the General Vendors Law, stating *inter alia*:

> The council hereby finds and declares that it is consistent with its principles of free speech and freedom of the press to eliminate as many restrictions on the vending of written matter as is consistent with the public health, safety and welfare.

(JA 44).

As a result of said exception, vendors of written material can publically vend written materials, including books on art, baseball cards, comic books and posters. (JA 196-197). While the City Council eliminated the requirement of a license for vendors of written material, they still required that said vendors be regulated under the time, place and manner restrictions.

The Bery respondents are all artists who want to sell their work on the sidewalks. (A28). None of the respondents are represented by a gallery. Other than the sidewalk, the Bery respondents have no other public forum to display and sell their work. Thus the sidewalk display and sale becomes an integral part of the creation, expression and communication of their work. (*Id.*). The artists' inability to display and sell their work bars

the natural flow of the expression from creation to communication. (*Id.*).

The United States Court of Appeals for the Second Circuit reversed the District Court's holding that artwork is not protected under the First Amendment to the United States Constitution. (A11-17). The court held further that the display and sale of artwork was so interrelated as to be one expression. (A22). The court held that the General Vendors Law violated the respondents' rights under either the strict scrutiny or the lesser standard, since it was not narrowly tailored and did not offer alternative public avenues of expression. Finally, the Second Circuit held that the *de facto* ban violated the respondents' rights under the Equal Protection Clause of the Fourteenth Amendment because it provided a different standard for written material as opposed to artistic expression.

REASONS FOR DENYING THE WRIT

The writ should be denied by this Court because the Second Circuit properly applied established law under the First and Fourteenth Amendments to the United States Constitution.

The Court of Appeals was correct in finding that a *de facto* ban on the respondents' artistic expression was within the protection of the First Amendment. Second, it properly held that the petitioners' regulation was not narrowly tailored and left *no* alternative opportunity for said expression.

The decisions of this Court mandate denial of the petition for a writ of certiorari. Petitioners' reliance on *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 554 (1996), as presenting a "direct conflict" with *Bery* must fail. Moreover, petitioners have totally misconstrued binding constitutional case law.

I.

THERE IS NO CONFLICT BETWEEN *ONE WORLD* AND *BERY.*

Petitioners contend that certiorari should be granted because *One World* directly conflicts with the decision below. *One World* and *Bery* do not indicate a split in the Circuits but rather a consistency in the Circuits' *application* of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) standard. In *One World* the Ninth Circuit, applying the *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) standard applicable to "content-neutral" time, place and manner regulations affecting constitutionally protected activities, upheld a statute which excluded the sale of message-bearing T-shirts on the sidewalks of Waikiki.

Initially, unlike the ban under review in *One World*, which encompassed very few exemptions, the flat, *de facto* ban that applies to the vending of original artwork in New York City has effectively barred an entire medium of expression from the public forum (A18-19), rather than the "one narrow form of expression" foreclosed in *One World*, 76 F.3d 1009, 1014. Here, also, the medium of expression — fine art — conveys the personal perspective of its creator, as opposed to a manufactured T-shirt displaying a generic message. The Second Circuit evaluated the General Vendors Law under the lesser standard under *Ward*, but stated that the banning of an entire medium *may* trigger the strict scrutiny standards. (A18). As the Ninth Circuit pointed out, this Court's holding in *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038 (1994), which struck down a statute foreclosing the display of signs on residential property, "rested heavily on the view that the city's ordinance closed off a 'unique and important' mode of expression for which there is 'no practical substitute.' *Id.* at . . . 114 S. Ct. at 2045-46." 76 F.3d at 1015.

Rejecting the T-shirt vendors' contention that the sale of their merchandise — as opposed to the wearing of the shirts — was a "unique mode of expression akin to displaying a sign in front of one's home," the *One World* court stated that the medium of expression in *Ladue* "has a unique effect because it 'provide[s] information about the identity of the "speaker" [which is] an important component of many attempts to persuade.' *Ladue*, . . . 114 S. Ct. at 2046." 76 F.3d at 1015. It is indisputable that the public display and sale of respondents' artistic creations — which certainly provide information about the artists' identity — is a "venerable" and "unique" mode of expression. The rationale at the heart of *One World* would apply with equal force in the instant case.

Petitioners have not contended, as in *One World*, that local merchants have complained of unfair competition and that the vending constitutes a "visual blight." Their sole contention is that the ordinance, as applied to vendors of artwork, promotes New York City's "interests in keeping public streets safe and free of congestion and obstacles." (P18). While this is unquestionably a legitimate concern, the City already controls congestion in its most crowded thoroughfares by enforcing specific time, place, and manner — including size and placement of display — restrictions detailed in the General Vendors Law. (A8, JA150-55). Accordingly, general vendors are precluded from selling their works of art in locations similar to those in Waikiki.

These restrictions, apparently absent from the statute reviewed in *One World*, also apply to those exempt from the licensing requirement, such as vendors of written materials. Significantly, as the *Bery* court found, the record is devoid of *any* evidence "concerning [the City's] need to ensure street safety and lack of congestion that would justify the imposition barring the display and sale of visual art on the City streets." (A19).

Thus, as the court below also found, the General Vendors Law is not "narrowly tailored to serve a significant government purpose" and petitioners must find "a less restrictive alternative." (A18-19).

Respondents also point out that New York City's General Vendors Law imposes licensing requirements on vendors of T-shirts that include written words, and other "similar merchandise". (P12). As the court below found, petitioner's philistinian view of fine art as "mere merchandise" is devoid of any legal, historical or intellectual merit. (A13-15). In any event, vendors of message-bearing T-shirts are not foreclosed from selling their wares in New York City, as they are in Waikiki.

Perhaps the most compelling distinction between the petitioners in *One World* and those in the instant case is that the former have alternative channels of communication to reach their intended audience. The issue in *One World* was the one of T-shirts with written messages to communicate with others the ideas, views and expressions of the plaintiff. The Ninth Circuit found there may be other ways to express (in writing) their opinions. In the case at bar the communication is *artwork*, the unique and specific expression of the artists, and as such to ban the artists is to ban the communication. As the Ninth Circuit found, the T-shirt vendors were not precluded from handing out literature, proselytizing, or soliciting donations, handing out their T-shirts, mingling with tourists, and wearing the T-shirts in public all as alternative avenues to express their ideas, views and opinions.[2] It is obvious that in the case at bar, as the court below found, such alternative channels of communication do not exist for respondents. (A21-22).

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2. The court also found that the petitioners could sell the T-shirts through local retail outlets or by opening their own stores. This *non* public forum alternative is not available to respondents.

For the above reasons, respondents respectfully submit that there is no conflict between the *Bery* decision and that of the Ninth Circuit in *One World*.

II.

THE COURT OF APPEALS CORRECTLY RULED THAT VISUAL ART IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION AND THAT THE EXHIBITION AND VENDING OF ARTWORKS BY ARTISTS, IN PUBLIC FORUMS, IS ALSO FULLY PROTECTED.

There is no doubt that visual art is a fully protected means of expression and communication. Petitioner's attempt to contend otherwise is futile. As demonstrated by the court below, this Court has found that the scope of the First Amendment extends to a variety of artistic modes of expression, such as music (without words), theater, and other forms of entertainment. (*See* A11-13). In *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1985), which involved visual art, the Seventh Circuit recognized that, "the First Amendment has been interpreted to embrace purely artistic as well as political expression. . . ."

Petitioner's reliance on *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970), as establishing that art without political or social messages or thought is worthy of "minimal" constitutional protection, is unavailing, as *Close* was essentially overruled by *Cohen v. California*, 403 U.S. 15, 21 (1971). In any event, the First Circuit's sliding scale approach, with visual art at or near the bottom, contradicts precedents such as *Winters v. New York*, 333 U.S. 507, 510 (1948) (expression merely intended to entertain, rather than instruct or politicize, is fully protected); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501

(1953) (creative arts like film "affect public attitudes in ways 'ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.' "); and *Abood v. Detroit Board of Education*, 431 U.S. 209, 301 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection").

In addition, there is no evidence that the sliding scale approach has been adopted by this Court, in its holdings, as the scope of First Amendment protection has expanded, rather than contracted. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, __ U.S. __, 115 S. Ct. 2338, 2345 (1995) (abstract music, literature, and art, such as the painting of Jackson Pollack, are "unquestionably shielded"), and *Cohen v. California, supra*, 333 U.S. 15, 26 (the "emotive function" of speech "may often be the more important element of the overall message sought to be communicated"). Petitioners' contention that *Piarowski, supra*, "is apparently the only published case that can be read to suggest that the display of visual artwork is, in and of itself, fully protected under the First Amendment" (P22), is fallacious, as established by ample precedent.[3]

3. Respondents also point out that petitioners' reliance on language contained in *Spence v. Washington*, 418 U.S. 405, 409-10 (1974), was taken out of context. As part of its inquiry as to whether or not the appellant's conduct "was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," this Court cited language in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), concerning its rejection of "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." This "limitless variety of conduct" does not apply to artistic expression. As this Court's decisions establish, and the *Bery* court found, "paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection" (A16); courts have not afforded similar protection to other varieties of conduct, such as social dancing and tattooing. (A16-17).

There is also no reason to reject the *Bery* court's well founded conclusion that the sale of art is also protected. (A15-17). As the Second Circuit pointed out, respondents cannot create their art without compensation, and "the street marketing is in fact a part of the message of [their] art." (A16). Respondents' audience exists in the public forum, not in the rarified and exclusive province of the art gallery: "Anyone, not just the wealthy, should be able to view . . . and buy [respondents'] artwork." (A16). In addition, every artist should be afforded the opportunity to communicate with members of the public, particularly those who are not exposed to fine art. Accordingly, the sale of respondents' creations is "inseparably intertwined" with respondents' protected mode of expression.

Finally, while petitioner contends that "it would be nearly impossible" to exempt vendors of artwork because " 'what is art is inherently subjective' " (P23), the court below correctly found that the City has ordinances containing a definition of "artist." Petitioner has also proved capable of deciding precisely what types of "written materials" are exempt from the licensing requirement. (A17, n.6). Finally as the Second Circuit stated:

> . . . simply because the matter does not lend itself to judicial determination does not mean that is it not appropriate for local lawmakers and governmental bodies such as the City to tackle.

(A17).

III.

THE COURT OF APPEALS CORRECTLY RULED THAT THE LICENSED GENERAL VENDORS LAW IS UNCONSTITUTIONAL AS APPLIED TO RESPONDENTS, WHO HAVE BEEN EFFECTIVELY BANNED FROM EXHIBITING AND SELLING THEIR ARTWORKS IN PUBLIC PLACES IN ALL FIVE BOROUGHS OF NEW YORK CITY.

While both respondents and the court below have cause to question the "content-neutrality" of the General Vendors Law because it bans visual expression while "subjecting [written expression] to a more limited form of regulation" (A17), the court found the ordinance unconstitutional even under the more lenient standard of scrutiny applied in *Ward, supra*, 491 U.S. at 791.

Following the *Ward* standard, the General Vendors Law cannot be construed as "narrowly tailored to serve [the] significant governmental interest" of avoiding street congestion and ensuring free and safe passage, because it has effectively banished an entire medium of expression "when more narrowly drawn regulations will suffice." (A18-19). Significantly, as the court below found, petitioner has totally failed to bear its burden to prove that this governmental interest justifies such a sweeping prohibition (A19-20); *see also Turner Broadcasting System, Inc. v. FCC*, __ U.S. __, 114 S. Ct. 2445, 2470 (1994) (citations omitted) (The government bears the burden not simply of " 'position[ing] the existence of the disease sought to be cured,' " but of "demonstrating that the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way"); *Cincinnati v. Discovery Network, Inc.*, __ U.S. __, 113 S. Ct. 1505, 1517 (1993) ("sweeping ban that bars from . . . sidewalks a whole class of constitutionally protected

speech" is not narrowly tailored). As pointed out above, the General Vendors Law contains time, place and manner restrictions addressed solely to the problem of congestion; these restrictions apply to vendors of written materials. (A20).

Petitioner has also totally failed to demonstrate that the ordinance "leave[s] open ample alternative channels of communication," *Ward*, 492 U.S. at 791. In fact, it has tacitly conceded, there are *no* alternative channels of communication in the *public* forum. Petitioner's contention that "respondents remain free to sell their artwork in *private* establishments, from their own *homes*, or on their own *property*" (P25) portrays their miscomprehension of the *Ward* standard. The Second Circuit clearly applied the *Ward* standard in this regard. (A22).

For the above reasons, this Court should recognize that the General Vendors Law is unconstitutional as applied to respondents and deny the petition for a writ of certiorari.

IV.

THE SECOND CIRCUIT CORRECTLY FOUND THAT SINCE ART IS PROTECTED TO THE SAME EXTENT AS WRITTEN EXPRESSION, THE GENERAL VENDORS LAW HAS VIOLATED THE EQUAL PROTECTION RIGHT OF THE RESPONDENTS.

The Second Circuit held that since art was fully protected, the General Vendors Law must be held unconstitutional as violation of the respondents' right under the Equal Protection Clause of the Fourteenth Amendment. The court held that since a distinction is made between the two types of protected expression, the district court was incorrect in dismissing the Equal Protection argument under a rational basis test. (A23).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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